INDEX.

ACCOMPLICE.

See Murder, 1.

ACCOUNT STATED.

Acquiescence. Although an account stated is, in law, an account settled between the debtor and creditor therein, in which a sum of money or a balance is agreed on, and an acknowledgment by the debtor in favor of the creditor of a balance, or sum certain, to be due, and an express or implied promise to pay the same, by the debtor to the creditor; yet, it is not necessary, to constitute an account stated, that the admission of the demand be made in express terms, but if the creditor has rendered his account to the debtor, exhibiting the items thereof and the amount due thereby, and the account is not objected to by the debtor within a reasonable time, the acquiescence of the debtor therein is to be taken as an admission that the account was truly stated, and if it has been assigned, it is not material whether such admission was made before or after the assignment. *Powell et al. v. Pacific Railroad*, 658.

ACTION.

See Demand.

ADMINISTRATION.

1. Probate court judgment: mutual claims: effect of allowance. Where there are mutual items of indebtedness between an individual and an estate, a judgment by the county court, allowing the claim of the former against the latter, is not of itself conclusive evidence, that his indebtedness to the estate was adjudicated and deducted in making the allowance. *Sweet, Admr. v. Maupin*, 65.

2. Offset: parol evidence. When such a judgment is offered in bar to an action by the administrator to collect the indebtedness due the estate, if it bears evident marks of alteration, parol evidence is admissible to show that it was made not as an absolute judgment, but only as an ascertainment of the amount due from the estate, to be used by way of offset against defendant's indebtedness to the estate. *Id.*

3. JUDGMENT: FRAUDULENT ALTERATION: PAROL EVIDENCE. In such case parol evidence is also admissible to show that the alteration is fraudulent; but it should be very clear and forcible. *Id.*

4. AN ADMINISTRATOR'S DEED is not invalidated by reason of the fact appearing on its face that the land was appraised by only two householders. *Johnson et al. v. Beazley*, 250.

5. RECITAL. A recital in a deed and in the certificate of acknowledgment thereof, that it is executed by the grantor as administrator, is evidence of his appointment as administrator. *Id.*

6. PROBATE COURT JUDGMENTS. The probate courts of this state are courts of record, and their jurisdiction in respect to wills and the administration of the estates of deceased persons is general, exclusive and original; and whilst any action on subjects not committed to their jurisdiction is of no force or validity, their action on these subjects is entitled to the same weight as that of any other court of record, and is conclusive in all collateral proceedings. *Id.*

7. ADMINISTRATOR'S DEED: JURISDICTION. It is not essential to the validity of an administrator's deed, that the record of the court from which he derived his appointment, shall show affirmatively the existence of all the facts necessary to authorize the appointment. *Id.*

8. ADMINISTRATOR'S APPOINTMENT CAN NOT BE QUESTIONED COLLATERALLY. The appointment of an administrator cannot, in a collateral proceeding, be invalidated by proof that the deceased, at the time of his death, had his place of abode in a county other than that in which the appointment was made. *Id.*

9. ADMINISTRATOR DE BONIS NON: PLEADING. In a suit by an administrator *de bonis non*, the petition showed that the estate had, prior to his appointment, been under the charge of two administrators, and that the letters of one of them had been revoked, but it failed to show that the letters of the other had been revoked, or his administration had been otherwise brought to a close. *Held*, that this omission rendered the petition fatally defective. For aught that appeared, the estate was still under the charge of the former administrator, and plaintiff as administor *de bonis non*, had no right to recover. *The State to the use of Ranney, &c. v. Green et al.*, 528.

ADMISSION.

SEE DAMAGES, 4

ADVANCEMENT.

1. PARENT AND CHILD: HOTCHPOT. A voluntary conveyance of land by a parent to a child is, *prima facie*, an advancement, and, if the child come in for a distributive share of the estate of the parent such advancement should be brought into hotchpot; but, by bringing into hotchpot, under our statute, it is not meant that the property given by way of advancement should, in kind or specie, be thrown in with the property which has descended from the parent, but, that it should be estimated and charged against such child according to its value at the time the advancement was made without interest. *Ray v. Loper*, 470.

2. EVIDENCE. Although declarations made by a father to a son, and not contradicted by the son, to the effect that he had given lands to the son, or furnished him the money wherewith to buy them, are admissible as evidence for what they are worth, to establish these facts against the son or his heirs, there is no principle of law that would permit the gift to be established by declarations of the father to third persons; for this would enable him, virtually, to disinherit one of his children, without making a last will or testament. *Id.*

ADVERSE POSSESSION.

SEE LIMITATIONS, 2.

AIDING ESCAPE OF PRISONERS.

SUFFICIENCY OF INDICTMENT. An indictment for conveying into a jail instruments to aid the escape of a prisoner confined for felony need not set out the particular felony with which the prisoner was charged. *The State v. Addcock*, 590.

AMENDMENT.

1. AMENDMENT OF PLEADINGS AT THE TRIAL. Where to avoid a plea of the statute of limitations, plaintiff averred part payment by the defendant within the statutory period, and upon the trial it appeared that the payment was not made by defendant, but was in fact made by a co-maker of the note, it was no error for the court to permit the pleading to be amended so as to conform to the fact. And the alleged variance between the pleading and the evidence was not material, and, therefore, might have been disregarded and the facts found according to the evidence, because the payment before the statutory bar attached by any one authorized to make payment, took the case out of the statute, and the only substantial issue raised by the pleading, was whether, under the circumstances, the statute was a bar. *Bennett v. McCanse*, 194.

2. REPLEVIN IN JUSTICE'S COURT: DEFECTIVE STATEMENT: POWER OF CIRCUIT COURT TO PERMIT AMENDMENT. In an action brought in a justice's court under the statute concerning the claim and delivery of personal property (Wag. Stat. 817,) an affidavit to plaintiff's statement which omits to say that the property claimed has not been seized under any process, execution or attachment against the property of plaintiff, is defective; and the circuit court, on appeal, has no power to permit it to be amended. *Madkins v. Trice* 656.

ANSWER.

SEE DAMAGES, 4.

APPEAL.

1. INJUNCTION: FINAL JUDGMENT. No appeal lies from an order dissolving a temporary injunction and awarding damages and costs. *Johnson et al. v. Board of Education*, 47.

2. PRACTICE, CHANGE OF, EFFECT ON PENDING SUIT: APPEAL, DEFECTIVE WHEN TAKEN, VALIDATED BY SUBSEQUENT ENACTMENT. Where, by a statute in force at the time of the trial of a cause, certain steps were required to be taken in case of appeal; but between the taking of the appeal and the filing in the appellate court of the transcript in said cause, an act is passed dispensing with this requirement, the appeal is not invalidated by the fact that in taking and prosecuting it the appellant has failed to comply with the requirement. *Cline v. Brooks, Admr.*, 61.

3. APPEAL, WHEN PERFECTED. An appeal is not perfected till the transcript is filed in the appellate court. *Id.*

4. APPEAL: RIGHT OF, WHEN NOT LOST. When, in the progress of a cause, the trial court has held that a state of facts whose existence is admitted, constitutes a complete bar to the suit, the refusal of plaintiff at the trial to offer evidence in support of his case does not deprive him of the right of appeal. *The State to the use of Bates County v. Smith et al.*, 464.

5. FINAL JUDGMENT: MOTION FOR NEW TRIAL: IRREGULAR EXECUTION. An order of the circuit court adjudging an execution to be void for irregularity, and directing the sheriff to pay to the defendant in the execution, the money made by the sale of his property under it, is a final judgment, from which an appeal will lie; and no motion for a new trial need be made in order to secure a review of the judgment in the appellate court. *Slagel, Admr. v. Murdock*, 522.

6. MECHANICS' LIEN: OWNER MAY APPEAL FROM JUDGMENT AGAINST HIS PROPERTY. An owner, who has been made party to a mechanics' lien case, is entitled to appeal from a judgment in favor of a sub-contractor subjecting his premises to the lien. *Hilliker et al. v. Francisco et al.*, 598.

SEE COSTS.

APPROPRIATION.

SEE STATE BOARD OF EQUALIZATION.

ARBITRATION.

1. The courts are disposed to regard tribunals of arbitration with favor, as being of the parties' own selection, preventing litigation in court and avoiding expense and delay. *Neely v. Buford*, 448.

2. WHAT IS NOT MISBEHAVIOR IN THE ARBITRATORS. Upon the hearing of a case before arbitrators, certain items of account were referred to in the argument and brief of the attorney for one of the parties, which, upon examination after the case was submitted, the arditrators were unable to find in the books offered in evidence, which were numerous, disorderly and difficult to be deciphered. Without the knowledge and in the absence of the other party and his attorney, the arbitrators requested the first named attorney to point them to the places in the books, where the items referred to by him were to be found, which he did without comment or explanation. *Held*, that this was not misbehavior on the part of the arbitrators, and did not authorize the setting aside of their award. *Id.*

ARRAIGNMENT.

See Practice, Criminal, 7.

ASSAULT.

An indictment for a felonious assault, under Sec. 23, Wag. Stat., p. 450, need not state that the act was done willfully, intentionally, with malice, with a deadly or dangerous weapon, or under circumstances which, had death ensued, would have constituted murder or manslaughter. *The State v. Moore*, 606.

See Shooting

ASSIGNMENT.

Title bond. The obligee in a bond for title to land has such an interest as may be assigned, and this both by virtue of the statute (2 Wag. Stat. 999, § 2,) and independent of that statute. *Melton v. Smith*, 315.

See Account Stated.

ATTACHMENT.

1. Non-residence: affidavit. The affidavit for an attachment on the ground of non-residence of defendant need not allege that the demand is due. (Wag. Stat., pp. 181, 182, §§ 2, 6). *Mastin et al. v. First National Bank, Garn.*, 16.

2. Attachment bond: seal. An instrument given as an amended attachment bond, but not sealed, and not having the word "seal" incorporated in it, is inoperative as a bond, and cannot supersede the original bond, or render it inoperative. *State ex rel. Gilbert v. Eldridge*, 584.

3. Attachment bond: set off: unliquidated damages. In a suit upon an attachment bond, the defendant cannot assert, as a set-off, the unliquidated damages arising from a breach of the covenants of a lease. *Id.*

4. Landlord and tenant act: general and special judgment: nunc pro tunc entry: forthcoming bond. Where, in an attachment suit under the Landlord and Tenant Act, the writ of attachment was levied upon the crop, grown by the tenant on the leased premises during the year, for which accrued the rent, for which the suit was brought, and the writ of summons was personally served upon the defendant, and, thereafter, a general judgment was regularly rendered in favor of the plaintiff and against the defendant. *Held*, that this was a proper judgment, and, as there was no entry of record, nor anything in the nature of the proceeding to indicate that it was not the very judgment the court rendered, the entry, at the next term, of a judgment *nunc pro tunc*, specially, against the property attached, as well as generally, against the defendant, who was not then in court, was a nullity; and that an execution issued thereon was also a nullity; yet, as, before the entry of the *nunc pro*

tunc judgment, an execution had been issued on the original judgment and duly returned by the sheriff not satisfied, and the original judgment was not vacated by the *nunc pro tunc* entry, this was sufficient to warrant proceedings on the forthcoming bond. *Hubbard v. Henning's Exr.*, 647.

5. LANDLORD AND TENANT ACT: ATTACHMENT OF PROPERTY SUBJECT TO LIEN. Although the provision for an attachment, in favor of the landlord, in the Landlord and Tenant Act, was not enacted for the purpose of enforcing the lien upon the crop grown upon the demised premises, in any year, for the rent accruing for such year, as given by said act, yet, a writ of attachment, properly sued out under the 26th section of said act, may be levied upon a crop subject to such a lien. The case of *Price v. Roelzell, Aministratrix*, 56 Mo. 500, explained. *Id.*

6. ATTACHMENT: FORTHCOMING BOND. The surety in a forthcoming bond is not relieved by the action of the court in quashing the attachment writ, if, at the same term and within four days after the order is made, it is set aside, although, between the making and the setting aside of such order, the surety returns to the defendant in the attachment suit money held by him as an indemnity. *Id.*

7. ATTACHMENT: EXECUTION: INTERVENING LEGISLATION. An execution sale in an attachment case relates back to the date of the levy of the attachment, and creates a charge as of that date. No intervening legislation can affect the rights of the parties. *Hall v. Stephens*, 670.

ATTORNEY AND CLIENT.

1. ESTOPPEL. Plaintiffs having bought a lot, relying upon the opinion of defendant, an attorney at law, that the title was good, subsequently sold the lot to defendant on credit, giving him a bond for title, and at his request erected a building on it, of which he took and kept possession. In a suit to recover the price of the lot and house, *Held*, that defendant was estopped by these facts to show that plaintiffs had acquired no title to the lot. *Soward et al. v. Johnston*, 102.

2. AUTHORITY OF ATTORNEY TO MAKE STIPULATIONS. An attorney has power to stipulate that the opposite party may take judgment against his client without further notice on a verdict already rendered, and this as falling within the general management of the case. Such a stipulation will not lose its force by reason of the lapse of over ten years before the judgment is entered, no revocation of the authority having taken place in the mean time. *Barlow v. Steel*, 611.

ATTORNEY'S FEES.

SEE DAMAGES, 3, 4.

AUTHENTICATION OF RECORDS.

The certificate of the Presiding Justice of the Fourth Judical Department of the Supreme Court of the State of New York is insufficient

to authenticate the transcript of the judgment of the Supreme Court of the State of New York for the county of Cattaragus, and complies neither with the act of Congress nor with our own statute. *Barlow v. Steel*, 611.

BIGAMY.

See Evidence, 1

BILL OF EXCEPTIONS.

1. Exceptions to referee's report must appear in bill of exceptions. Where exceptions to a report of a referee are relied on for reversal of a judgment, they must either be incorporated in the bill of exceptions, or so referred so as to identify them. *Rotchford v. Creamer*, 48.

2. Practice. The bill of exceptions must be prepared and signed during the term, unless the court, by consent of parties, orders otherwise. *Robart v. Long, Adm.*, 223; *Peake et al. v. Bell*, 224.

3. Bill of exceptions: refusal of judge to sign: signing by bystanders. Where, upon the refusal of the judge to sign the bill of exceptions, it was signed by three bystanders, and the court permitted the bill so signed, to be filed, it was held that the statements contained therein must be assumed to be true, notwithstanding the judge's certificate that it was untrue. *Norton v. Dorsey*, 376.

4. Affidavits. Affidavits in support of or in opposition to the bill of exceptions, are not required, unless the court refuse to permit it to be filed. *Id.*

5. Motions for new trial and in arrest. A bill of exceptions should be filed during the term at which the appeal is taken, or, if in vacation, by consent; and should contain the motion for new trial and the motion in arrest. *Baker v. Loring*, 527.

6. Bill of exceptions. The Supreme Court can notice nothing contained in a bill of exceptions not filed during the term of the court at which it is taken, unless the filing after the term be by consent of parties entered of record. *Clark v. Bullock*, 535.

7. Practice. This court will not examine into errors alleged to have occurred during the progress of the trial, where there is no bill of exceptions in the transcript; and it will not regard, as a bill of exceptions, what purports to be such and appears to be signed by the judge, but which does not appear ever to have been filed; and the termed "filed," as here used, signifies more than a mere indorsement to that effect, and denotes more especially, an entry made by the clerk upon the record, announcing and evidencing the fact that the bill has been allowed. *Johnson v. Hodges*, 589.

8. Refusal of a judge to sign bill of exceptions: mandamus. The judge of a trial court cannot be compelled by a writ of *mandamus* to sign a bill of exceptions which he alleges to be untrue, and the relator alleges to be true, when nothing appears to show which is in the right; the statute prescribes the remedy to be pursued by the relator in such a case. *State ex rel. Wittenbrock v. Wickham*, 634.

See Exceptions, 1.
Exhibits, 3.
New Trial, 1, 4.
Practice in Supreme Court, 7.

BOND.

See Attachment, 2, 3, 4, 6.
Coal Oil Inspector.
County Bonds.
Damages, 3, 4.
Title Bond.

BURDEN OF PROOF.

See Contract, 3.
Covenant, 1.
Negligence, 6.

CERTIORARI.

See Practice in Supreme Court, 11.

CHANGE OF VENUE.

See Venue.

CHARACTER.

See Evidence, 9.

CIRCUIT CLERK.

Fees. Section 24 of Article 6 of the Constitution of 1865, declared that "no clerk of any court * * * shall apply to his own use from the fees and emoluments of his office, a greater sum than $2,500 for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office, as the court may deem necessary and may allow; but all surplus of such fees and emoluments over that sum, after paying the amounts so allowed, shall be paid into the county treasury for the use of the county." Under this section, *Held*, that the clerk of a circuit court received and held the fees of his office in trust: 1st, to pay his deputies; 2d, to pay himself a sum not exceeding $2,500 per annum; 3d, to turn the residue into the county treasury. After receiving the amount allowed for his compensation, he had

no further interest in the fees, and if he went out of office leaving uncollected fees which he had earned, his successor in office, and not he, was entitled to collect them. *Thornton v. Thomas et al.*, 272.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

See Replevin.

COAL OIL INSPECTOR.

1. Liability for violation of official duty. The law concerning the inspection of coal and petroleum oils, made it the duty of the inspector, when notified, to inspect such oils, and to brand the barrels containing them "approved" or "rejected," according as they did or did not come up to the legal standard, and to secure the faithful performance of his duties, required him to give a bond with sureties, for the use of all persons who might be aggrieved by his acts or neglect. The defendant, an inspector, branded some empty oil barrels "approved," and left them with a manufacturer, who filled them with oil below the test, and without having it inspected by defendant, sold one of them to a dealer, who sold a gallon of the oil to plaintiff, whose wife was killed by the explosion of a lamp filled with some of it. *Held*, That defendant was guilty of a breach of duty for which plaintiff could maintain an action on his official bond. *County Court of St. Louis County ex rel. Jeaks v. Fassett et al*, 418.

COLLECTOR'S SETTLEMENT.

Collector's Settlement with County Court: clerk's quietus. A settlement by a collector of the revenue with the county court and the clerk's quietus to him are *prima facie* evidence that he has accounted for and paid over all funds that have come to his hands by virtue of his office, but are no bar to an action against him and the sureties in his bond to recover funds not accounted for. They may be explained or set aside as made through fraud or mistake. It is not necessary to resort to a direct proceding to vacate the settlement. *The State to the use of Bates County v. Smith*, 464.

COMMON CARRIER.

1. Special Contract: instruction. In a suit against a railroad company an instruction that defendant is responsible, as a common carrier, for any negligence, misconduct or carelessness resulting in loss to defendant, notwithstanding a special contract read in evidence, states the law correctly, and is not liable to the criticism that it leaves it to the jury to determine what are the responsibilities of a common carrier. *Sturgeon v. St. Louis, K. C. & N. Ry. Co.*, 569.

2. Measures of Damages. In such a suit for damages, caused by delay in delivering hogs, it appeared that there was a shrinkage in the weight of the hogs during the transit, greater than would have occurred if the train had gone through in the usual time. *Held*, That plaintiff was entitled to recover for this extra shrinkage, as well as for the decline in the market value of the hogs.

It appeared also that there was a special contract exempting defendant from liability for any loss by suffocation of the hogs, and that several were suffocated in the cars. *Held*, That, if this resulted from the negligence of defendant, plaintiff was entitled to recover for the loss, and the measure of his recovery would be the difference in the value of the hogs when alive and when dead, at the point of delivery. *Id.*

3. SPECIAL CONTRACT: PLEADING. Although a common carrier can not by a special contract exempt himself from liability for his own negligence, yet in an action against him, the gravamen of which is negligence in the transportation of live stock, whereby one of the animals escaped, or was stolen, it is competent for him to plead by way of special defense, in connection with the general issue, that he had a special contract with plaintiff, that plaintiff should accompany and take care of the stock, and defendant should not be liable for loss by escape from any cause whatever, and that plaintiff did accompany, but failed to take care of the stock. Such a contract will not exempt the carrier from liability for an escape occurring through his own negligence, but the mere fact of plaintiff's action sounding in tort does not forbid its being pleadded. *Oxley v. St. Louis, K. C. & N. Ry Co.*, 629.

4. When in such a case, on motion of plaintiff, the court has stricken out of the answer a count setting up a special contract that in case of loss plaintiff would give notice in writing to the defendant within a certain time, and that plaintiff had failed to give such notice, it is error for the court, upon the trial, to permit the plaintiff to make proof that defendant had waived such notice. *Id.*

CONFEDERATE STATES.

LACHES: ABSENCE IN CONFEDERATE STATES DURING THE WAR. Failure to sue until August, 1866, for specific performance of a contract to convey land, which matured in June, 1861, will not be deemed laches on the part of the plaintiff, when it appears that at the latter date he was driven by threats of assassination from his home in a section of the State then disturbed by war, and was compelled to take refuge and reside within the Confederate States until the war was over. *Melton v. Smith*, 315.

CONFESSION.

SEE EVIDENCE, 1.

CONFLICT OF LAWS.

INFANCY. An order of a court of another State made in conformity to a statute of that State, and purporting to relieve an infant residing in that State from the disability of non-age, can have no operation in Missouri. *State to use of Gilbreath v. Bunce*, 349.

CONSTITUTIONAL LAW.

1. STATUTES. A statute which merely furnishes a rule of construction for prior statutes, and is not in terms an amendment of them, is

not within the purview of Sec. 25, Art. 4 of the Constitution of 1865, and such statutes, as affected by the construing act, need not be set forth and published at length, as required by that section in cases where statutes are amended. *The State ex rel. Speck v. Geiger*, 306.

2. STATUTE: UNCONSTITUTIONALITY. The unconstitutionality of a statute must appear beyond a reasonable doubt, before the courts will pronounce it void. *The State v. Able*, 357.

3. SPECIAL JUDGE. The act of 1877 authorizing the trial of a criminal cause, pending in any circuit court, by a special judge selected by the attorneys of the court from their own number, when the judge of the court is of kin to the defendant, or is interested or prejudiced, or has been of counsel, or will not give defendant a fair trial, is constitutional. (Sess. Acts 1877, p. 357.) *Id.*

4. CRIMINAL PRACTICE: ABSENT WITNESS. The defendant in a crimina. case, by reading to the jury an agreed statement of what would be the testimony of an absent witness, who has been duly subpœned on his behalf, waives his right to have the witness personally present. *The State v. O'Connor*, 374.

5. JEOPARDY: CRIMINAL PRACTICE. The discharge, by the court, without defendant's consent, of a jury to whom a criminal case has been submitted, and who have failed to agree on a verdict, does not operate an acquittal or entitle him to a discharge. He has not been put in jeopardy within the meaning of the constitution, so as to bar a second trial for the same offense. *The State v. Copeland*, 497.

SEE CIRCUIT CLERK.

CORPORATION, 1, 3.

COUNTY BONDS, 2.

PLEADING CRIMINAL, 5.

SCHOOLS, 1, 2, 3.

TAXES, 1, 3, 4.

CONTINUANCE.

1. DILIGENCE. A conviction in a capital case will not be reversed, because the trial court overruled a motion for a continuance made after the case had been pending for three years, and based on the absence of witnesses, unless it is shown that the defendant has used the utmost diligence to procure their testimony. *The State v. Able*, 357.

2. PRACTICE, CRIMINAL. Where a cause has been once continued on defendant's application, the affidavit for a second continuance should disclose facts showing an honest effort on the part of the applicant to prepare his case for trial, and legal diligence. *State v. Lawther*, 454.

CONTRACT.

1. IMPLIED CONTRACT: INTENTION OF PARTIES. In order to raise an implied contract to pay for labor, it is not necessary that there shall have been an intention on the part of the laborer during his service to charge therefor; it is sufficient that the one for whom the labor is done expected to pay for it. So, unless the work was done under circumstances justifying the belief that no charge was intended, a liability arises, even though no charge was in fact intended by the laborer during his service. *Hay, Administrator of Crawford v. Walker*, 17.

2. In an action to recover the value of services rendered to a firm the defense relied on was an alleged understanding between the parties that plaintiff was to charge nothing for his services. The court having instructed the jury that, as there was no express contract, defendants were not liable if the services were rendered under circumstance justifying their belief that no charge was intended. *Held*, no error to refuse instructions to the effect that plaintiff could not recover, if at the time the services were rendered they were understood by all the parties to be gratuitous, or if plaintiff did not then intend to charge for them. The instructions given are equivalent to those refused. *Id.*

3. BURDEN OF PROOF. Where cattle were sold at an agreed price, and were subsequently delivered to and received by the purchaser. *Held*, that he must pay for them at that price, unless a different contract was afterwards entered into; and the burden of proof of such substituted contract is on the purchaser. *Wheeler v. Mabrey*, 166.

4. TIME NOT OF THE ESSENCE OF A CONTRACT: WAIVER. A court of equity will not treat time as of the essence of the contract, where the parties themselves have not so treated it. Even where it is of the essence, it may be waived. *Melton v. Smith*, 315.

SEE CORPORATION. 1.

DEMAND.

PLEADING, 1.

STREETS, 1.

CONVERSION.

1. TROVER AND CONVERSION. In a suit for the trover and conversion of a cow, proof that she was in defendant's stock lot, where he was collecting cattle for shipment abroad, and that she was put there by defendant or his servants, makes out a *prima facie* case for the plaintiff. It is unnecessary to show that defendant converted her to his own use in a particular manner, as by shipping her. *Ireland v. Horseman*, 511.

CONVEYANCE.

SEE DEED.

CORONER.

See Sheriff, 1.

CORPORATION.

1. Railroad charter constitutes a contract. A charter granted by the Legislature and accepted by a railroad corporation, constitutes a contract between the State and the corporation, the obligation of which cannot be impaired by a State constitution subsequently adopted. *Scotland County v. Missouri, Iowa & Nebraska R'y Co.*, 123.

2. Scope of general corporation and railroad laws of 1855. The general purpose of the general corporation and railroad laws of 1855 (R. S. 1855, Ch. 34, p. 369 and Ch. 39, p. 404,) and of the general corporation law of 1845 was to confer certain powers and privileges and impose certain duties and liabilities in the absence of any stipulations or provisions inconsistent with those contained in special charters subsequently granted. Where such inconsistencies occur in subsequent legislation, it must be understood that previous restrictions were intended to be removed. *Ib.*

3. Individual liability of stockholder: constitutional law. The constitution provides that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her." *Held*, that under this provision a stockholder is not liable for a debt of the corporation, if he has paid the whole amount of the stock subscribed or owned by him. *Schricker et al. v. Ridings*, 208.

4. Dissolved corporation, debts to. Debts due a moneyed corporation do not become extinct upon its dissolution. *McCoy v. Farmer*, 244.

5. Dissolution. Sale of its property and cessation of active business, do not *per se* accomplish the dissolution of a corporation. *Kansas City Hotel Company v. Sauer*, 279.

6. Dissolved corporation, suit by. Where the answer shows that the plaintiff was a corporation at the date of the contract sued on, the fact that it has subsequently become dissolved, will not avail to reverse a judgment rendered in its favor, the defect being a formal one at most. *Id.*

7. Libel. A publishing corporation is liable for publishing a libel. *Johnson v. St. Louis Dispatch Co.*, 539.

See Counter-Claim.

Municipal Corporation.

Practice in Supreme Court, 4.

Sheriff, 1, 2.

Taxes, 2, 3, 4.

COSTS.

REMITTITUR. Where the plaintiff desired a *remittitur* entered for the amount in excess of that claimed in his petition, and this excess was the only error in the record, the judgment of the lower court, modified by the desired entry, was affirmed; but it was held that plaintiff must pay the costs of the appeal. *Clark v. Bullock*, 535.

CO-TENANT.

1. PAYMENT OF TAXES AFTER SEVERANCE OF CO-TENANCY. When one of several co-tenants purchases the joint property at a sale in partition under a decree of court, the co-tenancy is thereby severed, and if he subsequently pays taxes which were due and constituted a lien upon the property at the time of the sale, he does it in the character of purchaser, and has no claim for contribution from his late associates. *Stephens v. Ells*, 456.

SEE PARTITION, 4.

COUNTER-CLAIM.

1. DEBT OF DEFUNCT CORPORATION. An indebtedness due to defendants from a defunct corporation, of which plaintiff was acting as manager when the indebtedness was created, will not be allowed as a counter-claim in a suit for the price of goods subsequently sold by plaintiff to defendants, although, when they made the purchase, defendants supposed they were still dealing with the corporation, unless plaintiff had notice of such indebtedness, and thereafter concealed from defendants the fact that he had succeeded to the business, and was selling on his own account, and not as manager of the corporation. *Field v. Hahn et al.*, 417.

COUNTY BONDS.

1. COUNTY SUBSCRIPTION TO STOCK OF RAILROAD COMPANY: RESCISSION OF ORDER OF SUBSCRIPTION: RECITALS. Where a county court makes an order for the subscription of stock to a railroad company, upon condition that the road shall be built within a specified time; *Held*, that it is in the power of the county court, by a subsequent order, to suspend the delivery of bonds of the county, issued in payment of the subscription, and remaining in the hands of a trustee, when it appears that the road has not been built within the time specified; the recitals in the order, however, like any other declarations made by one party to a contract, do not conclude the other party. *Cooper v. Sullivan County et al.*, 542.

2. CONSTITUTIONAL LAW. The act of March 21st, 1868. "authorizing county courts to issue bonds for the purpose of paying for the building of bridges and macadamized roads heretofore contracted for and built," is constitutional (following *Steines v. Franklin Co.* 48 Mo. 167, and *Ritchie v. Franklin Co.* 22 Wall. 67,) HENRY J. and SHERWOOD, C. J., dissenting. *Bradley et al. v. Franklin Co. et al.*, 638.

COUNTY COURT.

See Collector's Settlement.

Road, 3.

School, 4

COUNTY SEAT.

1. County seat, destruction of: judgment rendered at temporary seat. If it appears by the record of a judgment that the court which pronounced it, had jurisdiction of the person of the defendant, and of the subject-matter of the suit, such judgment will not, in a collateral proceeding, be held void upon proof being made that it was rendered at a place other than the established seat of justice of the county, when it is shown that all the houses at the latter place had, before the rendition of the judgment, been destroyed by fire, and that the county court had accepted, as a temporary seat of justice, the place at which the judgment was rendered. *Herndon et al. v. Hawkins et al.* 265.

COUNTY WARRANT.

1. County warrant drawn on general fund, may be sued on when. A county warrant payable out of any money in the treasury appropriated for county expenditures, is a written acknowledgement of indebtedness by the county, and if not paid, when presented, may be sued on by the legal holder, although there is no money in the treasury to pay (overruling *Howell v. Reynolds Co.*, 51 Mo. 154.) *International Bank of St. Louis v. Franklin Co.*, 105.

2. Assignment. No assignment of a county warrant will transfer the title unless made in the form prescribed by the statute. (W. S. 415. Sec. 34.) *Id.*

COVENANT.

1. Covenant of seizin: practice: burden of proof. Where, in an action on a covenant of seizin the defendant admits the covenant, and alleges seizin in himself at the date of the deed, it devolves upon him to prove the seizin, and if he fails, the plaintiff will recover. *Cockrell v. Proctor*, 41.

2. Covenant of seizin: paramount title. The existence of a paramount title, whether asserted or not, is a breach of the covenant of seizin, whether it be express, or be implied by the words, "grant, bargain and sell." *Id.*

3. Paramount title: abandonment of premises: failure to occupy: measure of damages. If a grantee fail to take possession of unoccupied premises conveyed by his deed, or having taken possession abandons them, he can recover of his grantor nominal damages only for breach of his covenant of seizin, unless there was a hostile assertion of a paramount title. *Id.*

4. MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEIZIN. When there has been neither actual eviction nor *ouster in pais*, under a paramount title, nominal damages only can be recovered for breach of a covenant of seizin. *Conklin v. Han. & St. Jo. R. R. Co.*, 533

SEE VENDOR'S LIEN, 1, 2, 3.

CRIMINAL LAW

1. RECENT POSSESSION OF STOLEN PROPERTY: INSTRUCTIONS. An instruction to the jury to the effect that possession of property proven to have been recently stolen, is presumptive evidence of the guilt of the party in possession, unless such posession is satisfactorily explained or accounted for, is not objectionable as a commentary on the evidence or an invasion of the province of the jury, when it is accompanied by other instructions to the effect that the jury should take into consideration all the facts shown in the evidence, giving to each such weight as they should consider it entitled to. *The State v. Robbins*, 443

2. STATEMENTS BY THE ACCUSED BEFORE TRIAL. When the State has made proof of statements of the accused, some of which are unfavorable and others favorable to himself, it is error for the court to withdraw the latter absolutely from the consideration of the jury by instructing them that nothing said by him can be used as competent evidence in his own favor. *The State v. Napier*, 462.

3. DRUNKENNESS NO MITIGATION OF CRIME. The circumstance that defendant was drunk to insensibility at the time of committing the homicide, will not repel any inference of malice and premeditation arising from other facts in the case, or mitigate the offense to a crime of a less degree. *The State v. Dearing*, 530.

4. PLEADING, CRIMINAL: INDICTMENT FOR CRIME JOINTLY COMMITTED. Under Sec. 20, p. 1089, Wag. Stat., it is the duty of a grand jury before which two persons are charged with the joint commission of a crime, in preferring a bill, to find it against both; but if for insufficiency of the evidence produced against one, they indict the other alone, the omission will not vitiate the indictment, although it appear upon the trial that the crime was in fact committed by both. *The State v. Steptoe*, 640.

5. ROBBERY: VERDICT. On an indictment for robbery in the first degree, containing but one count, the jury found by their verdict, that defendant was guilty of robbery, and assessed his punishment at ten years' imprisonment in the penitentiary, and there was judgment accordingly. *Held*, that the verdict was sufficient to support the judgment, although it failed to specify the degree of the crime of which it found defendant guilty. *Id.*

SEE ROAD, 2.

CUSTOM.

SEE NEGLIGENCE, 9.

DAMAGES.

1. COVENANT OF SEIZIN: MEASURE OF DAMAGES. If a grantee fails to take possession of unoccupied premises conveyed by his deed, or having taken possession abandons them, he can recover of his grantor nominal damages only for breach of his covenant of seizin, unless there was a hostile assertion of a paramount title. *Cockrell v. Proctor*, 41.

2. WARRANTY: MEASURE OF DAMAGES. In an action for breach of warranty that a machine is fit for use, the measure of damages is the difference between the price paid and its real worth, with interest at six per cent. *Courtney et al. v Boswell et al.*, 194.

3. INDEMNIFYING BOND: MEASURE OF DAMAGES; ATTORNEY'S FEES. In an action on a bond conditioned to save plaintiff harmless from certain mechanics' lien claims, defend all suits and pay all judgments that might be rendered thereon, and release the property sought to be subjected to such claims from the lien of such judgments, before said property should be advertised for sale, or plaintiff should be annoyed by execution, plaintiff may recover as damages all expenses, attorney's fees and costs incurred by him in consequence of a sale of said property under an execution issued to enforce such liens, and in proceedings to set aside such sale. *Kansas City Hotel Co. v. Sauer*, 279.

4. ADMISSION: MEASURE OF DAMAGES. In a suit on an indemnifying bond, the allegation in the petition that plaintiff had been compelled to pay, and had paid $500 for attorney's fees, costs and expenses in defending the subject of the bond, is such an allegation of fact as, unless denied by the answer, will be deemed admitted, and will be held a true statement of the amount of loss actually sustained. *Id.*

5. MEASURE OF DAMAGES FOR BREACH OF COVENANT OF SEIZIN. When there has been neither actual eviction nor *ouster in pais*, under a paramount title, nominal damages only can be recovered for breach of a covenant of seizin. *Conklin v. Han. & St. Jo. R. Co.*, 533.

6. MEASURE OF DAMAGES: CONTRACT OF HIRING: INSTRUCTION. In an action by a servant against his master for wrongful discharge brought before the expiration of the term, the general rule is that the measure of damages cannot exceed the contract price; but where the verdict was for a sum far below the contract price for the remainder of the term, and less than the testimony showed the plaintiff was entitled to recover; *Held*, that defendant was not prejudiced by an instruction naming, as the limit of damages, an amount exceeding what would have been due to the plaintiff at the end of the term, at the contract price, if the contract had not been broken. *Lambert v. Hartshorne*, 549.

7. PARTITION SALE; SHERIFF. It is the duty of the sheriff to execute and deliver to the purchaser at a partition sale, who has paid to him the purchase price, a deed conveying the interest of the parties in the partition proceeding, and his refusal to execute the deed under such circumstances will render him liable to an action by the purchaser; but, in such action, unless special damages be alleged and proved, the recovery should be nominal only. *Lusk v. Briscoe*, 555.

8. WHERE a sheriff advertises and sells an entire tract of land under an order of sale made by the court in a partition suit, which only empowers him to sell the half of said tract, and the fact of such sale is reported by him to the court, and the purchaser pays to him the full purchase price for the entire tract without knowledge of his want of authority, the purchaser can, on a proper case made in his petition, recover of the sheriff, by way of damages, to the extent of the loss sustained through such neglect or misfeasance. *Id.*

9. SUIT AGAINST COMMON CARRIER: MEASURES OF DAMAGES. In a suit against a railroad company for damages caused by delay in delivering hogs, it appeared that there was a shrinkage in the weight of the hogs during the transit, greater than would have occurred if the train had gone through in the usual time; *Held*, that plaintiff was entitled to recover for this extra shrinkage, as well as for the decline in the market value of the hogs.

It appeared also that there was a special contract exempting defendant from liability from any loss by suffocation of the hogs, and that several were suffocated in the cars; *Held*, that if this resulted from the negligence of defendant, plaintiff was entitled to recover for the loss, and the measure of his recovery would be the difference in the value of the hogs when alive and when dead, at the point of delivery. *Sturgeon v. St. Louis, K. C. & N. R. Co.*, 569.

10. MECHANIC'S LIEN: MEASURE OF SUB-CONTRACTOR'S RIGHT OF RECOVERY. If there is no evidence to show that the materials furnished by a sub-contractor are worth less than the price agreed on between him and the principal contractor, he is entitled to a lien for this agreed price regardless of the price that may have been fixed by the contract between the owner and the principal contractor. *Hilliker et al. v. Francisco et al.*, 598.

SEE REPLEVIN, 1.

SET-OFF.

TORTS, 1.

DATES.

DATES must be correctly set out in an indictment. *The State v. Hamilton*, 667.

DAYS OF GRACE.

SEE LIMITATIONS, I.

DE MINIMIS.

DE MINIMIS NON CURAT LEX. Though it did not appear to the court that the expense incurred by plaintiff in moving to the place where he had engaged to labor was a proper item of damages, nor that the expense incurred in returning to his former residence could be proved, not having been alleged as special damages, yet, as these sums were inconsiderable and appeared not to have been taken into account by the jury in determining the amount of their ver-

dict; *Held*, that the judgement would not be reversed for error committed in admitting testimony as to the amount of these expenses. *Lambert v. Hartshorne*, 549.

DEED.

1. SEAL: RECORD OF DEED. Where the official certificate of acknowledgement of a deed states that the seal of office is attached to the same the mere omission of the officer recording the deed to copy the seal, will not vitiate nor render invalid the record copy as evidence. *Parkinson et al v. Caplinger et al.*, 290.

2. ——: ORIGINAL DEED. An original deed showing that a seal was attached to the official certificate of acknowledgement, and, also that a seal was attached to the signature of the grantor, is properly admitted in evidence, though the record copy of the deed shows neither of these facts. *Id.*

3. NOTICE: RECORD OF DEED. The record of a deed, showing the lack of a seal, imparts notice of an equitable interest, at least, in the lands therein described. *Id.*

4. RECORD OF DEED: WHAT DESCRIPTION OF THE LAND IS SUFFICIENT TO IMPART NOTICE. In order that the record of a deed may impart notice to subsequent purchasers, the description of the land conveyed should be such that it can be identified by name, location, monuments, courses and distances or numbers, or the deed should refer to some other instrument lawfully of record, which does contain such means of identification. Mere reference to a certificate of entry of a United States land office, which embraces large bodies of land and is not recorded, without even designating the land as lying in the county where the deed is recorded, is not a sufficient description. *Gatewood v. House*, 663.

5. DELIVERY. The mere lodgement of a deed properly executed and acknowledged by the grantor, in a place to which the grantee has access, and from which he can, without hindrance, transfer it to his own possession, with the intent on the part of the grantor that the grantee may after his death take it, and have it recorded, and then become the owner of the land, does not constitute delivery of the deed; and the taking and recording of such a deed by the grantee, after the death of the grantor, is ineffectual to perfect it. *Huey v, Huey*, 689.

6. CASE ADJUDGED. A father having already given land to each of his other sons, executed and acknowledged an instrument conveying a tract to defendant by way of gift, and with defendant's knowledge deposited and kept it with his other papers in a chest to which defendant, who lived with him, had access. The father declared that his intention was that defendant should have the deed and the land after his death, and that the deed should not be recorded until then, since he might have occasion to make a change. After his father's death defendant took the deed and had it recorded; *Held*, that the declarations of the father could not give a testamentary character to the instrument, and that it could not take effect as a deed for want of delivery. *Id.*

SEE FORGERY, 2,

DEMAND.

ACTION: CONTRACT An action does not lie for the value of wheat which is to be delivered when threshed, until demand has been made for the wheat. *The State v. Mooney*, 478.

DESCRIPTION

SEE DEED, 4.

DEVISE.

SEE WILL.

DISCHARGE OF PRISONER

SEE PRACTICE, CRIMINAL, 1, 2.

DOWER.

1. PARTNERSHIP REAL ESTATE. A widow is not entitled to dower of real estate bought and improved with partnership funds by a firm, of which her deceased husband was at the time a member, and held and treated by them as partnership property, and sold after his death to pay the debts of the firm, which was insolvent, notwithstanding the title was taken in the name of the individual members and not of the firm. *Willett v. Brown*, 138.

2. TRUST FOR PAYMENT OF PARTNERSHIP DEBTS. Real estate so purchased and treated is to be deemed, so far as the legal title is concerned, as estate held in common and not in joint tenancy; but as to the beneficial interest it is held in trust, each holding his property in trust for the partnership until the partnership account is settled and the partnership debts are paid. *Id.*

3. DOWER ACT CONSTRUED. The statute (Wag. Stat. 542, sec. 23) which provides that "the widow shall have dower of the real estate of her husband * * * although the same may have been held by him as joint tenant or tenant in common or copartner," has no application to real estate charged with such a trust. *Id.*

4. HOMESTEAD: ESTOPPEL: RES JUDICATA. A widow entitled to a homestead estate in land of her deceased husband, is not precluded from claiming it by the fact, that dower has already been assigned to her out of the same land, and that she accepted the assignment without then preferring her claim of homestead. *Gragg et al. v. Gragg et al.* 343.

DRUNKENNESS.

NO MITIGATION OF CRIME. The circumstance that defendant was drunk to insensibility at the time of committing a homicide, will not repel any inference of malice and premeditation arising from other facts in the case or mitigate the offense to a crime of a less degree. *The State v. Dearing*, 530.

DYING DECLARATIONS.

1. DYING DECLARATIONS. On a trial for murder, dying declarations are properly received in evidence, when shown to have been made by the deceased after he had abandoned all hope of recovery, and in view of death then impending. *The State v. Draper*, 335.

2. Statements made by the deceased are admissable, in evidence as dying declarations, only so far as they relate to the killing, and the facts and circumstances attending it, and constituting a part of the *res gestæ*. So far as they relate to anterior occurrences tending to prove malice, they are inadmissible. *Id.*

EJECTMENT.

1. OUTSTANDING TITLE. A defendant in an action of ejctment, who claims adversely to both parties to a mortgage, which is due and unsatisfied, can not avail himself of the mortgage as an outstanding title to defeat the action. *Hardwick v. Jones et al.*, 64.

2. VOLUNTARY CONVEYANCE. It is no objection to the plaintiff's title in ejectment that he is not a purchaser for a valuable consideration. *Id.*

3. GENERAL ISSUE: EVIDENCE. The defendant in ejectment may, under the general issue, show title in himself by proof that he purchased the property at sheriff's sale under a judgment and execution against the plaintiff. *Davis v. Peveler, et al.*, 189.

SEE LANDS AND LAND TITLES.

SWAMP LANDS, 4.

ELECTION.

1. PROSECUTING ATTORNEY: TIE VOTE; NEW ELECTION. In the case of a tie vote in the election of a prosecuting attorney, the Governor, and not the sheriff, is the proper officer to order a new election. *State ex rel., Speck v. Geiger*, 306.

2. ELECTION RETURNS: BOARD OF CANVASSERS: MANDAMUS. In a proceeding by mandamus to compel a board of canvassers to count a vote as returned by the officers of election, when it appears that an alteration has been made in the return of the vote, but the canvassers do not know whether it was made before or after the return was delivered to them by the officers of election, the circuit court will inquire and determine what the return, as delivered, actually was, and will compel them to make the count accordingly. *The State ex rel., Metcalf v. Garesche, et al.*, 480.

EQUITY.

1. JURISDICTION TO SET ASIDE DEEDS: UNDUE INFLUENCE. When it is shown that a deed of gift, executed by a woman twenty-three years of age in favor of her two aunts, with whom she was at the time

living, and by whom she had been brought up from infancy, was not her spontaneous act; that it arose from suggestions of others, and was pressed upon her as a moral obligation, the pressure coming in part from her uncle, who had been her guardian, and in whom she reposed implicit confidence; that no motive of affection or gratitude prompted her; that her act was the result of habitual deference to the opinion of her uncle, and was no intelligent judgment of her own; that she did not at the time know what was the amount or value of the property she was conveying, and her uncle, though possessed of the knowledge, failed to disclose it to her—such deed will, on the petition of the grantor, be set aside as having been obtained by the exercise of undue influence over her. *Ranken et al. v. Patton et al.*, 378.

3. ———. A court of equity will set a deed aside for undue influence exercised over the grantor by a third person, the same as if it was exercised by the beneficiary in the deed. The latter takes it subject to the taint of improper influence. *Id.*

LACHES. It is too familiar a principle to require discussion that equity does not foster the prosecution of stale demands, encourage *laches*, or lend its aid to any but the prompt and vigilant. *Stevenson v. Saline Co.*, 425.

SEE ADVANCEMENT.

CONTRACT, 4.

LACHES.

RESCISSION.

VENDOR'S LIEN, 1, 2.

ERROR.

SEE WRIT OF ERROR.

ESCAPE.

SEE AIDING ESCAPE OF PRISONER.

ESTATE.

SEE HUSBAND AND WIFE.

ESTOPPEL.

1. ATTORNEY AT LAW. Plaintiffs having bought a lot, relying upon the opinion of defendant, an attorney at law, that the title was good, subsequently sold the lot to defendant on credit, giving him a bond for title, and at his request erected a building on it, of which he took and kept possession. In a suit to recover the price of the lot and house; *Held*, that defendant was estopped by these facts to show that plaintiffs had acquired no title to the lot. *Soward v. Johnston*, 102.

2. ONE, who by his statements and conduct induces another to purchase an interest in land, will not afterwards be heard to deny the existence of such interest. *Melton v. Smith*, 316.

3. RECOGNITION OF TITLE IN ANOTHER. When one procures an order of a county court for the sale of land, as of land then claimed by the county, and in the order the land is spoken of, as that "formerly owned" by the person procuring the order, he is estopped to deny or recall this recognition of title in the county after another has acted upon it by purchasing the land of the county, paying the purchase money and making improvements thereon. *Stevenson v. Saline County*, 425.

4. IRREGULAR EXECUTION. When the defendant in an execution irregularly issued on a valid judgment, stands by and sees his property sold under it, without an effort to arrest the sale, he cannot afterwards claim the proceeds on the ground of irregularity. *Slagel, Admr. v. Murdock*, 522.

SEE HOMESTEAD.

EVIDENCE.

1. CONFESSION: MURDER: BIGAMY. On a trial for murder, evidence of a confession by the prisoner of an intention to commit bigamy is incompetent. *The State v. Cox*, 29.

2. PRESUMPTION. A deed will be presumed to have been properly excluded from evidence, when the reasons for its exclusion do not appear in the record. *Cockrell v. Proctor*, 41.

3. JUDGMENT: PAROL EVIDENCE. Parol evidence is admissible to show that certain matters as to which a judgment is silent, were not adjudicated. *Sweet v. Maupin*, 65.

4. POSSESSION OF STOLEN PROPERTY. Recent possession of stolen property is, in presumption of law, guilty possession. *The State v. Hill*. 84.

5. INDICTMENT: PROOF: VARIANCE. An indictment charging the stealing of a gray mare mule is supported by evidence that the animal stolen was an iron-gray mare mule, or a dark iron-gray mare mule. *Id.*

6. STATEMENTS OF THE ACCUSED. When the prosecution offers in evidence a conversation of the accused, consisting of admissions criminating himself and statements favorable to himself, the jury must consider the whole together. The law presumes that the former are true. The jury may believe or disbelieve the latter as they may appear to be true or false. *Id.*

7. CRIMINAL LAW. When the State has put in evidence in a criminal case, an admission of the accused made in the course of a conversation, the accused is entitled to have the whole of the conversation concerning the subject matter of the prosecution go to the jury. *The State v. Branstetter*, 149.

8. PRESUMPTION OF CORRECTNESS OF OFFICIAL ACTION. Nothing appearing to the contrary, it will be presumed that an order for a writ of *venditioni exponas* in a civil case, which appears by the record to

have been made at a special term of court, was made at a special term, regularly held for the transaction of the general business of the court, and not at one appointed for the sole purpose of trying persons confined under criminal process, and at which no civil business can be lawfully transacted. *Hicks v. Ellis et al.* 176.

9. EVIDENCE OF GOOD CHARACTER. The fact that defendant is charged in the petition with fraudulent dealing, furnishes no ground for the introduction of evidence to prove his good character. *Dudley v. McCluer*, 241.

10. RECITAL. A recital in a deed and in the certificate of acknowledgement thereof, that it is executed by the grantor as administrator, is evidence of his appointment as administrator. *Johnson et al. v. Beazley*, 250.

11. NEWLY DISCOVERED EVIDENCE: CRIMINAL PRACTICE. The Supreme Court will not disturb a judgment of conviction in a criminal case, because the trial court overruled a motion for a new trial based on newly discovered evidence, when the evidence does not tend to prove any matter of defense, but merely to impeach a witness for the State, if it appears that defendant knew before the trial that the testimony of such witness would be taken against him, notwithstanding it may also appear that he had previously made other statements contradictory to what he testified to on the trial. *The State v. Robert J. Smith*, 313.

12. MURDER; RES GESTÆ. Declarations, to be a part of the *res gestæ*, must have been made at the time the act was done, which they are supposed to characterize, and must be calculated to unfold the quality of the facts they are intended to explain, and so to harmonize with them as, obviously, to constitute one transaction. Upon a trial for murder, it was held that declarations of defendant made an hour before the killing, and entirely disconnected therewith, to the effect, that deceased had been following defendant up for a long time to kill him, and that defendant was in fear of his life when he saw deceased, and that defendant was going to leave the country to avoid a difficulty with deceased, are not admissible as part of the *res gestæ*. *The State v. Evans*, 574.

13. WRITTEN STATEMENT OF WITNESS. The written statement of a witness, taken at a former trial, but not preserved or written down by any one authorized by law to do so, nor signed by the witness, cannot be received in evidence when it appears that the witness, though absent when the statement is offered, has been present at an earlier period of the trial, and it does not appear that the process of the court has been invoked, nor that it would have been ineffectual if it had been invoked. *Id.*

14. NEW TRIAL: CUMULATIVE EVIDENCE. Newly-discovered evidence, which is merely cumulative in its character, is no cause for a new trial. But this rule might be relaxed in a case where the State should attack or bring in doubt the evidence, which the cumulative evidence would tend to confirm. *Id.*

15. OPINIONS OF WITNESSES, NOT EXPERTS. The opinions of witnesses who are not experts, as to whether or not a turn-table is a dangerous machine, and as to whether or not it was gross carelessness to leave it unfastened or uncovered, are not competent evidence. *Koons v. St. Louis & Iron Mountain R. R.* 592.

16. DEVISE: FAMILY. When a devise is to "H. S. and family," evidence will be received to ascertain who constitute the family. *Hall v. Stephens*, 670.

SEE ADVANCEMENT, 2.

CONVERSION.

CRIMINAL LAW, 1, 2.

DYING DECLARATIONS, 1, 2.

EJECTMENT, 3.

JUDGMENT, 2, 3.

NEGLIGENCE, 9.

NEW TRIAL, 2, 3.

PRACTICE CIVIL, 1.

PRACTICE CRIMINAL, 6.

RAILROAD, 5.

SPECIFIC PERFORMANCE, 1, 2

SWAMP LANDS, 3, 4.

EXCEPTION.

PRACTICE: BILL OF EXCEPTIONS. Where no exception is saved, in the bill of exceptions, to the overruling of a motion to set aside in nonsuit, the omission is not cured by a general exception when the motion in arrest is overruled. *City of St. Joseph v. Ensworth*, 628.

SEE BILL OF EXCEPTIONS, 1.

EXECUTION.

1. ALIAS FI. FA. NO ABANDONMENT OF PREVIOUS LEVY, WHEN: A party, by suing out an *alias fi. fa.* directed to the sheriff of one county, does not abandon a levy already made under a writ issued to the sheriff of another county. *Hicks v. Ellis et al.* 176.

2. VENDITIONI EXPONAS—EFFECT OF ACT OF MARCH 23, 1863, CONCERNING EXECUTIONS ON LEVY OF ORIGINAL WRIT. Before the passage of the act of March 23, 1863; (*Sess. Acts*, 1863, p. 20) a writ of *venditioni exponas* had issued from the circuit court of one county to the sheriff of another county to enforce a levy on real estate previously made on an execution, which had expired without a sale being made, because there had been no term of the circuit court of the latter county at which it could be made. The *venditioni exponas* was returnable to the December term, 1863, but for the same reason no sale was made till March, 1865; *Held*, That under the 3d section of that act the original levy remained in force, and the sale then made was valid. That section applies to any execution issued from a court of record in one county to the sheriff of another, under which real property might be sold, whether the levy was made under such execution or under some other writ, which it supplemented or succeeded. *Id.*

3. EXECUTION, STAY OF: MOTION TO QUASH: PRACTICE. The purpose of the 67th section of the statute concerning executions (Wag. Stat. p. 615) is to enable a defendant, by preferring a petition verified by affidavit to the judge in vacation, to obtain a stay of execution, until he can be heard in court as to whether it shall be set aside or quashed; but this does not exclude the ordinary remedy by motion to quash unsupported by affidavit made in open court in term time. *Heuring v. Williams*, 446.

4. IRREGULAR EXECUTION, HOW CURED; THE DOCTRINE OF RELATION. Where injustice will be done to one party by permitting another to take advantage of a technical irregularity in an execution, growing out of the fact that the judgment of the circuit court was irregularly affirmed by the appellate court, a subsequent regular affirmance will be held to relate back so as to cure the irregularity in the execution. The doctrine of relation will not be invoked to maintain injustice; but is often relied on to prevent the perpetration of gross wrong. *Slagel Admr. v. Murdock*, 522.

5. ESTOPPEL. When the defendant in an execution irregularly issued on a valid judgment, stands by and sees his property sold under it, without an effort to arrest the sale, he cannot afterwards claim the proceeds on the ground of the irregularity. *Id.*

6. HUSBAND AND WIFE'S JOINT ESTATE. The interest vested in the husband by a devise to him and his "family," is vendible on execution against him; but the purchaser buys subject to the wife's right, in case she survives her husband, to take the entire estate. *Hall v. Stephens*, 670.

7. STATUTE CONSTRUED. The foregoing is not affected by the statute (Wag. Stat. p. 935 § 14), the only purpose of which is to prevent a sale under execution against the husband when the wife holds the fee in her own right. *Id.*

8. ATTACHMENT: INTERVENING LEGISLATION. An execution sale in an attachment case relates back to the date of the levy of the attachment and creates a change as of that date. No intervening legislation can affect the rights of the parties. *Id.*

SEE APPEAL, 5

REPLEVIN, 1.

SHERIFF, 1.

VENDITIONI EXPONAS.

EXECUTORS.

SEE ADMINISTRATION.

EXHIBITS.

1. FAILURE TO FILE EXHIBITS. Failure to file the note sued on can not be assigned for error in the Supreme Court, unless the objection was made in the court below. *Peake v. Bell, Admr.* 224.

2. NON-FILING OF BOND SUED ON. Objections to evidence and motion in arrest, on the ground that the bond sued on is not filed with the petition and no excuse is given for not filing it, will not be sustained. *State ex rel. Gilbert v. Eldridge*, 584.

3. BILL OF EXCEPTIONS. A copy of a bond, not incorporated in the bill of exceptions, although attached to the petition as an exhibit, can not be noticed. *Id.*

EX PARTE PROCEEDINGS.

SEE SUMMARY PROCESS.

EXPERT.

SEE EVIDENCE, 15.

FAILURE OF TITLE.

RESCISSION: FRAUD. The courts will not decree the rescission of an executed contract for the sale of land, except on the ground of actual fraud. Mere failure of title in the grantor will not authorize such a decree. *Hart v. Hannibal & St. Joseph R'y Co.*, 509.

FAMILY

DEVISE. A devise to "H. S. and family" is a devise to H. S. and his wife and children. *Hall v. Stephens*, 670.

FEES.

SEE CIRCUIT CLERK.

FENCES.

SEE RAILROAD. 2, 3.

ROAD, 2.

FIERI FACIAS.

SEE EXECUTION.

FIXTURES.

AS BETWEEN MORTGAGEE AND MORTGAGOR. In determining whether an improvement upon land is a fixture, neither the intention of the person who put it there ultimately to remove it, nor the manner in which it is placed upon the land is a controlling fact; a good deal depends upon the object of its erection and the use for which it was designed. As between mortgagee and mortgagor a frame building erected by the side of a mill for use as an office in connection with the mill, is part of the realty, although erected after the mortgage was given, intended to be temporary only and to be ultimately re-

moved, and not attached to the mill, nor fixed to the ground, but resting upon wooden blocks sitting upon the surface of the earth. *State Savings Bank v. Kercheval et al.*, 682.

FOREIGN JUDGMENT.

See Judgment, 8.

FORGERY.

1. Passing forged draft. An indictment which charges the defendant with falsely, &c., selling, exchanging and delivering as true a forged draft, knowing the same to be forged, and with intent to defraud, is good under a statute which prohibits the passing, uttering and publishing of forged paper. *The State v. Watson*, 115.

2. Sufficiency of indictment for forgery: deed. An indictment for forging a deed need not state that the instrument, if genuine, would have conveyed the land; it is sufficient to say that it purported to convey it. Nor need it charge that the deed was executed or acknowledged. The word deed of itself imports a complete instrument. *The State v. Fisher*, 437.

3. Pleading: evidence. The statute (Wag. Stat. 1091, § 28) dispenses with the common law rule, which required that an indictment for forgery should set out the indictment alleged to be forged *in haec verba*; but it is still necessary that it shall be described accurately; and very slight inaccuracies will be fatal. An indictment described an instrument alleged to be forged, as a note for sixty dollars, signed with the name of James C. Orr. The instrument offered in evidence was a note for sixty dollars, bearing interest at ten per cent. from date, and signed by J C. Orr; *Held*, a fatal variance, both as to the name of the supposed maker and the liability which the instrument purported to create. *The State v. Fay*, 490.

FRAUD.

See Counterclaim.

Evidence, 9.

Judgment, 3.

Judicial Sale, 2.

Pleading, 1.

Recission, 4.

GAMING DEVICE.

1. Statute construed. The statute (Wag. Stat. 503, §§ 24–27) authorizing the seizure and destruction upon summary process of "any prohibited gaming table or gaming device kept or used within the county," does not warrant the destruction of such property, unless it is kept or used for gaming purposes. *McCoy v. Zane.*

GRAND JURY

See Pleading Criminal, 5, 8, 9.

GRANT, BARGAIN AND SELL.

See Vendor's Lien, 1, 2, 3.

GRATUITOUS SERVICES.

See Contract 1, 2.

HOMESTEAD.

Dower: Estoppel. A widow entitled to a homestead estate in land of her deceased husband is not precluded from claiming it by the fact that, that dower has already been assigned to her out of the same land, and that she accepted the assignment without then preferring her claim of homestead. *Gragg v. Gragg.* 343.

HOTCHPOT.

Parent and child: Advancement. A voluntary conveyance of land by a parent to a child is, *prima facie*, an advancement, and, if the child come in for a distributive share of the estate of the parent, such advancement should be brought into hotchpot; but, by bringing into hotchpot, under our statute, it is not meant that the property, given by way of advancement should, in kind or specie, be thrown in with the property which has descended from the parent, but that it should be estimated and charged against such child according to its value at the time the advancement was made without interest. *Ray v. Loper*, 470.

HUSBAND AND WIFE.

1. Married woman: separate estate: judgment: practice. In an action against a married woman and her trustee, to enforce a demand against her separate estate, no relief being asked against her husband, the decree should go against the wife and trustee only, though the husband is made a co-defendant in obedience to the statute. *Staley v. Ivory et al.* 74.

2. Estate in Land. Both at common law and under the statute (Gen. Stat. 1865 p. 443 § 12) husband and wife, to whom a devise is made, take as joint tenants, and not as tenants in common; and when a devise is made to husband and wife and other persons, the husband and wife together represent a single unit or integer of legal identity, and together take a share equal to the share of each of the others. *Hall v. Stephens*, 670.

3. Husband and wife's joint estate: execution. The interest vested in the husband by such a devise is vendible on execution against him; but the purchaser buys subject to the wife's right, in case she survives her husband, to take the entire estate. *Id.*

STATUTE CONSTRUED. The foregoing conclusion is not affected by the statute (Wag. Stat. p. 935 § 14), the only purpose of which is to prevent a sale under execution against the husband when the wife holds the fee in her own right. *Id.*

SEE PRACTICE, CIVIL, 4.

VENDOR'S LIEN, 1, 2, 3.

WITNESS, 2, 3.

INDICTMENT.

SEE PLEADING CRIMINAL.

INFANCY.

CONFLICT OF LAWS. An order of a court of another State made in conformity to a statute of that State, and purporting to relieve an infant residing in that State from the disability of non-age, can have no operation in Missouri. *State to the use of Gilbreath v. Bunce et al.* 349.

INJUNCTION.

1. APPEAL: FINAL JUDGMENT. No appeal lies from an order dissolving a temporary injunction and awarding damages and costs. *Johnson et al. v. Board of Education*, 47.

2. WHEN THE PROPER REMEDY TO PREVENT TRESSPASSES. Under the statute (Wag. Stat. 1032 § 24) in order to obtain an injunction, it is not necessary to show that a threatened injury is irreparable. It is sufficient if there is no adequate remedy by action for damages. Hence, a trespasser engaged in removing a building, which is necessary to the convenient use of another building, will be restrained from the prosecution of his purpose, at the suit of one having an interest in the property, although the trespasser be a person of undoubted solvency. Such a trespass may produce inconveniences and perplexities for which a jury could not, under the rules of law, give full compensation. *State Savings Bank v. Kercheval*, 682.

INSTRUCTIONS.

1. INSTRUCTIONS should not be given upon an issue in relation to which there is no evidence before the jury. *Cockrell v. Proctor et al.* 41.

2. INSTRUCTIONS are properly refused, which amount to a comment on the evidence or a repetition of others already given. *The State v. Hill*, 84.

3. PRACTICE, CRIMINAL. It is the duty of the court in the trial of a criminal case to give proper instructions defining each crime of which under the indictment the accused can be convicted, and of which there is evidence in the case. *The State v. Branstetter*, 149.

4. INSTRUCTIONS upon a state of facts, which is shown by the concurring testimony of all the witnesses not to have existed, are properly refused. *McCoy v. Farmer*, 244.

5. INSTRUCTIONS, which are mere repetitions of those which have already been given are properly refused. *The State v. Evans*, 574.

6. CRIMINAL PRACTICE. When an indictment charges one offense and does not allege the facts necessary to constitute another, it is error for the court to give the jury instructions, which will authorize a conviction of the latter, even though the evidence may tend to show defendant to be guilty of the offense. *The State v. Arter*, 653.

SEE COMMON CARRIER, 1.

CRIMINAL LAW, 1.

DAMAGES, 6.

JURY, 1.

MANSLAUGHTER, 1

MURDER, 3, 4.

NEGLIGENCE, 8.

PRACTICE, CIVIL, 2.

INSURANCE.

PREMIUM NOTE: FAILURE TO PAY INSTALLMENT: SUSPENSION OF RISK; POLICY TO RE-ATTACH ON PAYMENT: WHAT THE INSURER MAY RECOVER: PAID-UP POLICY. Where the charter of an insurance company provides that the whole of a premium note payable in installments shall become due upon failure to pay any installment for thirty days after notice given to the maker of the default and the penalties incurred under the charter by reason thereof; and by the charter and a policy issued thereunder, such failure does not absolutely avoid the policy, but suspends it so that the company is not liable for a loss occurring during the continuance of such default, but upon the payment of the note (whether voluntary or enforced) the policy revives and re-attaches; in such case the company may recover the full amount of the note, and not merely such part as would bear the same proportion to the full amount as that portion of the period of the risk prior to the notice of default bears to the entire period covered by the policy. Upon payment of the full amount the insured becomes the owner of a paid up policy for the remainder of the original term. *American Insurance Co. v. Klink*, 79.

INTEREST.

SEE PROMISSORY NOTE, 2, 3. 4.

JEOFAILS.

1. DEFECTIVE PLEADING NOT CURED BY VERDICT, WHEN. Defective averment in the petition of matter essential to be proved in order to

authorize a verdict for plaintiff will not be cured by verdict, either at comman law or under the statute of jeofails (Wag. Stat. 1036 §§ 19, 20), when it appears by a bill of exceptions that the evidence offered at the trial did not tend to supply the defect. *International Bank of St. Louis v. Franklin County*, 105.

2. CASE ADJUDGED. Where the petition in a suit upon a county warrant stated the drawing of the warrant in favor of a person other than plaintiff, its delivery, that subsequently for a valuable consideration plaintiff became the holder and owner, and presented it to the county treasurer for payment, which was refused, but interest was paid thereon, and that the warrant was due plaintiff and unpaid, but failed to aver assignment to plaintiff in the form prescribed by statute, such assignment will not be presumed in support of a verdict and judgment for plaintiff, if the bill of exceptions shows that none such was made. *Id.*

SEE CORPORATION, 6.

PLEADING, 2, 3.

JEOPARDY.

DISCHARGE OF JURY FOR FAILURE TO AGREE: CRIMINAL PRACTICE. The discharge, by the Court, without defendant's consent, of a jury to whom a criminal case has been submitted, and who have failed to agree on a verdict, does not operate an acquittal or entitle him to a discharge. He has not been put in jeopardy within the meaning of the constitution, so as to bar a second trial for the same offense. *The State v. Copeland*, 497.

JUDGMENT.

1. PROBATE COURT JUDGMENT: MUTUAL CLAIMS: EFFECT OF ALLOWANCE. Where there are mutual items of indebtedness between an individual and an estate, a judgment by the county court, allowing the claim of the former against the latter, is not of itself conclusive evidence, that his indebtedness to the estate was adjudicated and deducted in making the allowance. *Sweet, Admr. v. Maupin*, 65.

2. OFFSET: PAROL EVIDENCE. When such a judgment is offered in bar to an action by the administrator to collect the indebtedness due the estate, if it bears evident marks of alteration, parol evidence is admissible to show that it was made not as an absolute judgment, but only as an ascertainment of the amount due from the estate, to be used by way of offset against defendant's indebtedness to the estate. *Id.*

3. FRAUDULENT ALTERATION: PAROL EVIDENCE. In such case parol evidence is also admissible to show that the alteration is fraudulent: but it should be very clear and forcible. *Id.*

4. COUNTY SEAT, DESTRUCTION OF: JUDGMENT RENDERED AT TEMPORARY SEAT. If it appears by the record of a judgment that the court, which pronounced it, had jurisdiction of the person of the defendant, and of the subject matter of the suit, such judgment will not in a collateral proceeding, be held void upon proof being made that

it was rendered at a place other than the established seat of justice of the county, when it is shown that all the houses at the latter place had, before the rendition of the judgment, been destroyed by fire, and that the county court had accepted, as a temporary seat of justice, the place at which the judgment was rendered. *Herndon et al. v. Hawkins et al.* 265.

5. PARTITION, WHAT IS NOT A FINAL JUDGMENT IN. Where the judgment is, that partition may be made between the parties, and that, for purposes of partition, sale be made of the premises, such a judgment is not final. *Parkinson v. Caplinger*, 290.

6. FINAL JUDGMENT APPEAL: MOTION FOR NEW TRIAL: IRREGULAR EXECUTION. An order of the circuit court adjudging an execution to be void for irregularity, and directing the sheriff to pay to the defendant in the execution, the money made by the sale of his property under it, is a final judgment, from which an appeal will lie; and no motion for a new trial need be made in order to secure a review of the judgment in the appellate court. *Slagel, Admr. v. Murdock.*

7. ENTRY NUNC PRO TUNC. A judgment entry made in pursuance of a stipulation of counsel more than ten years after the verdict, will not be treated as an entry *nunc pro tunc* as of the date of the verdict, when it does not purport on its face to be such. *Barlow v. Steel*, 611.

8. FOREIGN JUDGMENT: JURISDICTION. It is competent for the defendant to show in a suit upon a judgment from another state, that the court which gave the judgment had acquired no jurisdiction over him, and, for the plaintiff to show actual service of process on the defendant, or that defendant had authorized the entry of his appearance. *Id.*

SEE COLLECTOR'S SETTLEMENT.

EVIDENCE, 3.

HUSBAND AND WIFE, 1.

INJUNCTION, 1.

PROBATE COURT, 1, 2, 3.

JUDICIAL SALE.

1. SHERIFF INTERESTED. A purchase by a corporation at execution sale is not void because the sheriff conducting the sale is at the time a stockholder in the corporation. *Hardwick v. Jones et al.* 54.

2. FRAUD. It is no fraud on the part of the holder of several judgments to sell under a junior judgment, notifying bidders of the lien of those which are older. *Id.*

SEE VENDITIONI EXPONAS, 2.

WARRANTY, 3.

JURISDICTION.

1. POLICE POWER: SUMMARY PROCESS: JURISDICTION MUST APPEAR. A Judge's warrant for the destruction of property issued under a statute, which permits condemnation without affording the owner an opportunity for a hearing or trial, must show upon its face the existence of all the facts requisite to authorize its issue. *McCoy v. Zane*, 11.

2. ADMINISTRATOR'S DEED. It is not essential to the validity of an administrator's deed, that the record of the court from which he derived his appointment, shall show affirmatively the existence of all the facts necessary to authorize the appointment *Johnson et al. v. Beazley*, 250.

SEE PROBATE COURT, 1.

JURY.

1. INSTRUCTION: JURY THE JUDGES OF EVIDENCE. If the petition states a cause of action, and there is any evidence offered in support of the allegations made in it, and controverted by the answer, the trial court commits no error in refusing to take the case from the jury by instructions. *Stoddard v. St. Louis, K. C. & N. R'y Co.*, 514.

SEE PRACTICE, CRIMINAL, 4.

VERDICT, 1.

WITNESS, 1.

JURY TRIAL.

THE Supreme Court will not reverse a judgment for refusal of the lower court to allow a trial by jury, unless the record shows that such refusal was made a ground of a motion for a new trial, and the motion is preserved in the bill of exceptions, nor unless it appears that the appellant may have been prejudiced by such refusal. *Ward v. Quinlivin*, 453.

JUSTICE'S COURT.

1. A CASE in which plaintiff's statement of his cause of action, filed in the justice's court, *Held*, insufficient. *Swartz v. Nicholson*, 508.

SEE REPLEVIN, 2.

LACHES.

1. ABSENCE IN CONFEDERATE STATES DURING THE WAR. Failure to sue until August, 1866, for specific performance of a contract to convey land, which matured in June, 1861, will not be deemed laches on the part of the plaintiff, when it appears that at the latter date he was driven by threats of assassination from his home in a section of

the State then disturbed by war, and was compelled to take refuge and reside within the Confederate States until the war was over. *Melton v. Smith*, 315

2. If one of several joint obligors in a title bond for land, becomes unable to convey according to the contract, failure on the part of the obligee, during the continuance of such disability, to assert his rights, will not be imputed to him as laches. *Id.*

SEE EQUITY, 3.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT ACT: ATTACHMENT: GENERAL AND SPECIAL JUDGMENT: NUNC PRO TUNC ENTRY: FORTHCOMING BOND. Where, in an attachment suit under the Landlord and Tenant Act, the writ of attachment was levied upon the crop grown by the tenant on the leased premises, during the year for which accrued the rent for which the suit was brought, and the writ of summons was personally served upon the defendant, and, thereafter, a general judgment, was regularly rendered in favor of the plaintiff and against the defendant; *Held*, That this was a proper judgment, and, as there was no entry of record, nor anything in the nature of the proceeding to indicate that it was not the very judgment the court rendered, the entry, at the next term, of a judgment *nunc pro tunc*, specially, against the property attached, as well as generally, against the defendant, who was not then in court, was a nullity; and that an execution issued thereon was also a nullity; yet as, before the entry of the *nunc pro tunc* judgment, an execution had been issued on the original judgment and duly returned by the sheriff not satisfied, and the original judgment was not vacated by the *nunc pro tunc* entry, this was sufficient to warrant proceedings on the forthcoming bond. *Hubbard v. Henning's Ex'r*. 647.
2. ATTCHMENT OF PROPERTY SUBJECT TO LIEN. Although the provision for an attachment in favor of the landlord, in the Landlord and Tenant Act, was not enacted for the purpose of enforcing the lien upon the crop grown upon the demised premises, in any year, for the rent accuring for such year, as given by said act, yet a writ of attachment, properly sued out under the 26th section of said act, may be levied upon a crop subject to such a lien. The case of *Price v. Rotzell*, administratrix, 56 Mo. 500 explained. *Id.*

LANDS AND LAND TITLES.

1. LAND, CONFLICTING CLAIMS TO. A person claiming title to land does not forfeit his right by attempting to buy in a conflicting claim. *Hardwick v. Jones*, 54.

SEE ESTOPPEL, 1.

HUSBAND AND WIFE, 1, 2, 3.

LARCENY

SEE LIBEL, 1.

LIBEL.

1. CHARGE OF GRAND LARCENY. To publish of one, that he had disgraced the office he had filled, that he had been accused of stealing a horse, that he had sued the persons so accusing him, and that a jury had found for the defendants, obviously imputes the crime of grand larceny to the person of whom the publication is made. *Johnson v. St. Louis Dispatch Co.*, 539.

2. REPETITION OF CHARGE MADE BY ANOTHER. When one hears another make a charge which he repeats, he will not be exempt from liability, unless at the time of repeating the words, he affords the person of whom the charge is made a cause of action against the original author. *Id.*

3. PUBLISHING CORPORATION. A publishing corporation is liable for publishing a libel. *Id.*

LIEN.

SEE MECHANIC'S LIEN.

UNITED STATES SUCCESSION TAX.

VENDOR'S LIEN.

LIMITATIONS.

1. PROMISSORY NOTE: DAYS OF GRACE. The statute of limitations does not begin to run against a promissory note until three days after the date, when, by its terms, it is due. *McCoy v. Farmer*, 244.

2. ROADS: NON-USER BY THE PUBLIC: ADVERSE POSSESSION BY AN OBSTRUCTOR: CRIMINAL LAW. The non-user, for a period of ten years, of a road which the public has acquired a right to use as a state road by virtue of legal proceedings had under an act of the legislature, does not amount to an abandonment of the easement, so as to authorize the owner of the fee to inclose it; nor does the fact that he has for a like period maintained a fence across it entitle him to the possession of the roadway. Notwithstanding such non-user or inclosure for that period, he is liable to a criminal prosecution for obstructing the highway, if he maintains or continues to maintain a fence across the road. *The State v. Culver*, 607.

MANDAMUS.

1. In mandamus no relief will be granted but that especially prayed by the petitioner. *State ex rel. v. Holladay, State Auditor*, 76.

2. MANDAMUS: MINISTERIAL OFFICER. Before issuing a writ of mandamus to a ministerial officer, the court must ascertain what is his specific legal duty in the premises. *The State ex rel. Metcalf v. Gareshe et al.*, 480.

3. RETURN. It is not required that the return to a writ of mandamus be sworn to; and where respondent is represented by respectable

attorneys of the court, who have filed a return for him, the court can not, on the mere suggestion of the relator, say that the return so filed is not the return of the respondent. *State ex rel. Wittenbrock v. Wickham*, 634.

4. REFUSAL OF A JUDGE TO SIGN BILL OF EXCEPTIONS. The judge of a trial court cannot be compelled by a writ of mandamus to sign a bill of exceptions which he alleges to be untrue, and the relator alleges to be true, when nothing appears to show which is in the right; the statute prescribes the remedy to be pursued by the relator in such a case. *Id.*

5. ROADS. Section 25, 1223 Wag. Stat. invests the county court with a judicial discretion to determine whether or not a proposed road will be of sufficient public utility to justify the payment by the county of the damages assessed by a jury. It also permits the petitioners of the road to pay the damages themselves, and in case they do, makes it the duty of the county court to open the road; *Held*, that a writ of mandamus will not lie to compel the court to open a road at the expense of the county, nor to open it at the expense of the petitioners, unless they have voluntarily paid the damages. *Strahan v. County Court of Audrain County*, 644.

SEE ELECTION, 2.

MANSLAUGHTER.

1. MURDER: EXCUSABLE HOMICIDE: INSTRUCTIONS. When, upon a trial for murder, there is evidence given tending to show that deceased used a personal violence toward the accused, the court should by proper instructions define the crime of manslaughter as well as murder and excusable homicide, though the defense fails to ask such instructions. *The State v. Branstetter*, 149.

2. MANSLAUGHTER IN THE SECOND DEGREE. Where there was an altercation between defendant and deceased, and in a heat of passion, defendant struck deceased a blow on the head with a stick, which resulted in the death of deceased; *Held*, that the trial court committed error in refusing to instruct the jury as to manslaughter in the second degree, when asked to do so by defendant. *The State v. Gassert*, 352.

MARRIED WOMAN.

SEE HUSBAND AND WIFE.

MASTER AND SERVANT.

1. RAILROAD: MACHINERY: NEGLIGENCE: FELLOW SERVANT: PERSONAL INJURY. A railroad company is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake. The inspector represents the company, and is not a fellow servant of the brakeman. *Long v. Pacific R. R.*, 225.

2. MEASURE OF DAMAGES: CONTRACT OF HIRING: INSTRUCTION: In an

action by a servant against his master for wrongful discharge brought before the expiration of the term, the general rule is that the measure of damages cannot exceed the contract price; but where the verdict was for a sum far below the contract price for the remainder of the term, and less than the testimony showed the plaintiff was entitled to recover; *Held*, that the defendant was not prejudiced by an instruction, naming, as the limit of damages, an amount exceeding what would have been due to the plaintiff at the end of the term, at the contract price, if the contract had not been broken. *Lambert v. Hartshorne*, 549.

3. DE MINIMIS NON CURAT LEX. Though it did not appear to the court the expense incurred by plaintiff in moving to the place where he had engaged to labor was a proper item of damages, nor that the expense incurred in returning to his former residence could be proved, not having been alleged as special damages, yet, as these sums were inconsiderable and appeared not to have been taken into account by the jury in determining the amount of their verdict; *Held*, that the judgment would not be reversed for error committed in admitting testimony as to the amount of these expenses. *Id.*

SEE NEGLIGENCE, 7.

MAXIMS.

SEE DE MINIMIS.

OMNIA PRAESUMUNTUR RITE.

MECHANICS' LIEN.

1. MECHANICS' LIEN AGAINST BUILDING ALONE. A mechanics' lien may be enforced against a building alone, although the owner of the building is also the owner in fee of the land on which it is erected. A judgment against "the following described real estate, to wit: The Nelson House building, situated on lots 27 and 30, etc.," is effectual to enforce a mechanics' lien against the building. *Kansas City Hotel Co. v. Sauer*, 279.

2. MATERIAL MAN'S LIEN. Under the mechanic's lien law, a material man is not entitled to a lien for lumber furnished to a sub-contractor to be used in the construction of a building, unless it was actually so used. *Schulenberg v. Prairie Home Institute et al.*, 295.

3. MATERIALS FURNISHED SEVERAL BUILDINGS: DESCRIPTION OF PROPERTY TO BE CHARGED. A claim for a mechanic's lien for materials furnished towards the construction of two buildings, described them as "situated on that part of North La Grange * * * known as blocks 3 and 4, owned by" defendant. One of the buildings was erected on block 3, and the other on several of the lots which constituted block 4, and the blocks were separated by a street; *Held* that the claim was bad for uncertainty—1st, because it failed to show what materials went into each building; 2d, because it failed to show on which block or lots the buildings were respectively situated; and this conclusion is not altered by the fact that the two buildings together constituted one establishment for manufacturing purposes. *Lemly et al. v. La Grange Iron and Steel Co.*, 545.

4. OWNER MAY APPEAL FROM JUDGMENT AGAINST HIS PROPERTY. An owner, who has been made party to a mechanic's lien case, is entitled to appeal from a judgment in favor of a sub-contractor subjecting his premises to the lien. *Hilliker et al. v. Francisco et al.*, 598.

5. ACCOUNT. When it appears that the owner was apprised of the terms of the contract between the principal and the sub-contractor, an account filed by the latter for "Junction City stone furnished for First National Bank building, as per contract, and labor setting same $7,790" will be held a sufficiently specific statement of his claim for a mechanic's claim. *Id.*

6. MEASURE OF SUB-CONTRACTOR'S RIGHT OF RECOVERY. If there is no evidence to show that the materials furnished by a sub-contractor are worth less than the price agreed on between him and the principal contractor, he is entitled to a lien for this agreed price regardless of the price that may have been fixed by the contract between the owner and the principal contractor. *Id*

MORTGAGES.

SEE EJECTMENT, 1.

FIXTURES.

SCHOOLS, 4.

MUNICIPAL BONDS.

SEE COUNTY BONDS.

MUNICIPAL CORPORATION.

1. LIABILITY OF MUNICIPAL CORPORATION FOR TORTS: TREBLE DAMAGES: STATUTE OF TRESPASSES. A municipal corporation is liable for an act done by its agents, which is in its nature lawful and authorized, but is done at an unlawful place or in an unlawful manner, but not for an act which is in its nature unlawful or prohibited. For an act of the former class it is liable only in single damages; the treble damages allowed by the statute concerning trespasses (Wag. Stat., p. 1354) can not be recovered. *Hunt v. The City of Boonville*, 620.

SPECIAL TAX BILL. Where a city charter provides that whenever the mayor and city council shall order side-walks, &c., within the limits of the city, the cost of the same shall be paid by the owners of the property in the vicinity, as may be further provided by ordinance; and that whenever such work shall have been fully completed under the authority of ordinance, the city engineer shall compute the cost thereof and assess it as a special tax against the adjoining property fronting upon the work done, and each lot of ground shall be charged in proportion to the fronting thereof, &c.; *Held*, that in a suit upon a special tax bill for paving a side-walk in front of defendant's lot in said city, a petition, which does not allege that the work out of which the tax bill originated, was done by virture of an ordinance passed by the mayor and city council, and the city engineer, in computing the cost of the work, only

charged defendant's lot in proportion to the frontage thereof, is defective in not containing these allegations, both of which are material, and that a demurrer to the petition because of the want of either of these allegations was properly sustained. *Irvin v. Devore*, 625.

MURDER.

1. ACCOMPLICE. The mere mental approval by a bystander of a murder committed in his presence, does not make him an accomplice in the murder. *The State v. Cox*, 29.

2. MURDER IN THE SECOND DEGREE. From the simple act of killing the law presumes murder in the second degree. It is equally well settled that an intention to kill, is one of the elements of murder in the second degree, and that one can not be convicted of that offense unless he intentionally committed the homicide. *The State v. Gassert*, 352.

3. INSTRUCTIONS. On appeal from a conviction of murder, in the second degree, the Supreme Court will not inquire whether instructions were given to the jury by the trial court, on the subject of murder in the first degree, are correct. *The State v. Fritterer*, 422.

4. MURDER IN THE FIRST DEGREE: INSTRUCTIONS. An instruction which authorizes a jury to find a verdict of murder in the first degree without finding the act of killing to have been done with deliberation or premeditation is erroneous; and the error is not cured by another instruction which correctly defines the offense. *The State v. Dearing*, 530.

5. PRESUMPTION FROM KILLING. *Held*, That an instruction that, "if defendant killed deceased by shooting him with a pistol, the law presumes it is murder, in the absence of proof to the contrary," is literally correct; and that, although the presumption under our statute from such a killing is that of murder in the second degree; yet it is a presumption of murder nevertheless, and that the jury could not have mistaken the import of such an instruction, when considered in connection with other instructions that were given, clearly defining murder in the first degree, and pointing out the distinction between it and murder in the first degree. *The State v. Evans*, 574.

6. MURDER IN THE FIRST DEGREE: MURDER IN THE SECOND DEGREE. In order to establish the crime of murder in the first degree, the deliberate purpose to take life or to do some great bodily harm must exist, and this must be shown by the evidence, and by the evidence alone; but murder in the second degree may be shown by the killing alone in the absence of any extenuating evidence reducing the offense to some grade of manslaughter, or showing that it was a killing by accident or misfortune or in justifiable self-defense. *Id.*

7. THREATS TO KILL. Threats to kill will not justify the person whose life is threatened, in shooting the person making the threats, unless it appear from the evidence that, at the time of the shooting, the person who had made the threats, was making some effort to carry them out. Such threats, however, when recent and communicated to the knowledge of the person threatened, and causing him to

fear that an attack is about to be made upon him with intent to take his life or to do him some great bodily harm, will justifiy him in acting more promptly and upon less demonstrations of hostility than he would if such fears had not been so aroused; and even to the extent of taking life, if from the nature of the threats and the character of him who makes them, together with his appearance, conduct and demonstrations at the time, the person threatened has reasonable cause to believe that such attack with such intent is about to be made, although the object of the person so threatening is only frighten him, and there is no real danger. *Id.*

See Evidence, 1.

Manslaughter, 1.

Plead ig, criminal, 2, 3, 4.

NEGLIGENCE.

1. Negligence. The fact that defendant has been guilty of negligence, followed by an accident, does not make him liable for the resulting injury, unless that was occasioned by the negligence. *Harlan v. St. L., K. & N. R'y Co.*, 22.

2. Contributory negligence. Notwithstanding the injured party may have been guilty of contributory negligence, a railroad company is still liable for the injury if it could have been prevented by the exercise of reasonable care on the part of the company after discovery of the danger in which the injured party stood, or if the company failed to discover the danger through its own recklessness or carelessness, when the exercise of ordinary care would have discovered it and averted the calamity. *Id.*

4. ———. When the undisputed evidence showed that the negligence of the deceased contributed directly to produce his death, and that it was not possible after he placed himself in danger to prevent the accident, the railroad company is not liable. *Id.*

4. ———. The acts of the deceased amounted to negligence *per se* in in this case. *Id.*

5. Nuisance: railroad. Where a railroad track is built in a public street, the escape of soot, smoke and smells from the locomotive, the obstructions of the street with cars, and the jarring of earth and neighboring buildings by passing trains, to the inconvenience, discomfort and danger of adjoining proprietors, do not, in law, constitute a nuisance; if the charter of the company authorizes the laying of the track, unless the road is negligently or unskillfully built or operated. *Randle v. Pacific Railroad.* 325.

6. The burden of proof of such negligence or want of skill is upon the party complaining. *Id.*

7. Railroad: master and servant: vice-principal: contributory negligence. The petition stated, in substance, that plaintiff, a yardman in the employ of defendant, a railroad company, without fault on his own part, received an injury while engaged in the performance of his duty in uncoupling a train of cars; that defendant failed

to furnish a sufficient force of men for the work; that at the switching place where plaintiff was injured, defendant had provided a frog of an unnecessarily dangerous construction, in which plaintiff's foot was caught, so that he could not extricate it before he was run over by the locomotive; that the yard master and the engineer, who were working with plaintiff, were unskilled and incompetent, as defendant well knew, but plaintiff did not know, and that the engineer moved the train carelessly, by reason of all of which the plaintiff was injured. Plaintiff's evidence offered at the trial, tended to prove that it required the services of four persons, including plaintiff and defendant's yard-master to uncouple and switch a train with safety and dispatch; that an hour before the plaintiff received the injury, the yard-master, whose duty it was to employ and discharge hands, was notified that one of the regular hands was sick and unable to work, but provided no substitute for him; that it became necessary to make up a train, and for this purpose to uncouple and switch cars; that in the absence of the yard-master, plaintiff and one other man undertook to do the work, in the course of which it became necessary that plaintiff should go between the car and tender, and while so engaged his foot was caught in the frog and forced into it by the break beam of the tender; that the frog was an unusually dangerous one, and the break beam was unusually low and unsafe; that the engineer had been drinking that morning; that he was given to drunkenness and defendant knew it; that he backed the train recklessly and without waiting for a signal from plaintiff, and that defendant had to do the work of the absent man in addition to his own. The evidence also tended to show that plaintiff knew the dangerous character of the frog, the lowness of the brake beam, and that an insufficient force was engaged in making up the train; *Held* 1st, That the court committed no error in refusing to instruct the jury that upon the pleadings and proofs the plaintiff could not recover; 2d, That the neglect of the yard-master to provide a substitute for the absent man, was the negligence of the company; 3rd, That though plaintiff knew that defendant's break beam and frog were dangerous and the force of hands was insufficient, yet it was for the jury, under proper instructions, to say whether they were so glaringly defective and insufficient, that a man of common prudence or sense would not have undertaken the work, in which case plaintiff would have been guilty of contributory negligence, or whether he could, under the circumstances reasonably suppose that by the use of great caution and skill he could do the work with safety. *Stoddard v. St. Louis, K. C. & N. R'y Co.*, 514.

8. PERSONAL INJURIES TO CHILD: CONTRIBUTORY NEGLIGENCE OF PARENTS: INSTRUCTION. An instruction to the jury to find for plaintiffs, if they "believe from the evidence that plaintiffs negligently permitted their son to wander from his home and to go upon the turn table of defendant, and that the son was killed by said turn-table, and that he was so young and inexperienced as not to possess sufficient judgment to warn him of the danger of the place or character of the machinery, and that he was killed by negligence and carelessness of defendant in not properly guarding and protecting said turn-table and keeping children from playing on the same" was held to be clearly erroneous; but it was also held, that, because of said instruction, the court would not reverse the judgment where it appeared that there was no evidence whatever that plaintiffs ever assented to or approved of their child going on the turn-table; but on the contrary they prohibited his so doing. *Koons v. St. Louis & I. M. R. R. Co.*, 592.

9. CUSTOM OF OTHER RAILROADS. The custom of other railroads, as to keeping their turn-tables locked, is immaterial upon the issue, whether or not the defendant railroad was guilty of negligence in not doing so. *Id.*

SEE COMMON CARRIER, 1, 2.

RAILROAD, 1, 4, 5.

NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

SEE CRIMINAL LAW.

NEW TRIAL, MOTION FOR.

1. PRACTICE IN SUPREME COURT: BILL OF EXCEPTIONS. The Supreme court will not examine into the merits of a case where no motion for a new trial is incorporated in the bill of exceptions, though the bill shows that such a motion was made and was overruled. *Rotchford v. Creamer*, 48.

2. NEWLY DISCOVERED EVIDENCE. A motion for a new trial, on the ground of newly discovered evidence, should disclose its character, name the witnesses and show that it is important. *Davis v. Peveler et al.*, 189.

3. NEWLY DISCOVERED EVIDENCE. A motion for a new trial in crimina cases, on the ground of newly discovered evidence, should be supported by affidavit, and should show what the evdience is, that it is material, and what efforts have been made to discover it in time. *The State v. Fritterer*, 422.

4. BILL OF EXCEPTIONS. A motion for a new trial, not incorporated in the bill of exceptions, though contained in the transcript, cannot be noticed by the Supreme Court. *Stevenson v. Saline County et al.*, 425.

5. MOTION FOR NEW TRIAL. The Supreme Court will notice no errors not appearing in the record proper, unless the motion for a new trial is incorporated in the bill of exceptions. Mere reference in the bill to a prior page of the transcript, where it is set out in full, will not answer. *Collins et al. v. Barding*, 496.

SEE BILL OF EXCEPTIONS.

PRACTICE IN SUPREME COURT, 4, 9.

NOTICE.

SEE DEED, 3, 4.

NUISANCE.

1. RAILROAD: NEGLIGENCE. Where a railroad track is built in a public street, the escape of soot, smoke and smells from the locomotives, the obstruction of the street with cars, and the jarring of the

earth and neighboring buildings by passing trains, to the inconvenience, discomfort and danger of adjoining proprietors, do not, in law, constitute a nuisance, if the charter of the company authorizes the laying of the track, unless the road is negligently or unskillfully built or operated. *Randle v. Pacific Railroad*, 325.

NUNC PRO TUNC ENTRY.

1. PARTITION: JUDGMENT NUNC PRO TUNC. Where the order approving the report of commissioners in partition, although informal, taken in connection with the report itself, affords sufficient data, there is no error in the entry, at a subsequent term, of a judgment *nunc pro tunc*, ratifying and giving effect to the report. *Mead v. Brown*, 552.

2. JUDGMENT. A judgment entry made in pursuance of a stipulation of counsel more than ten years after the verdict, will not be treated as an entry *nunc pro tunc* as of the date of verdict, when it does not purport on its face to be such. *Barlow v. Steel*, 611.

SEE LANDLORD AND TENANT, 1.

OBSTRUCTION OF THE HIGHWAY.

SEE ROAD, 2.

OFF-SET.

SEE JUDGMENT, 2.

OMNIA PRAESUMUNTUR RITE.

SEE EVIDENCE, 8.

PARAMOUNT TITLE.

SEE COVENANT.

PARENT AND CHILD.

SEE ADVANCEMENT, 1, 2.

NEGLIGENCE, 8.

PARTIES.

PARTNERSHIP: INDIVIDUAL CONTRACT. A contract running in the name of "R. W. H. and J. F. K., of the firm of H. & K.," though signed in the name of the firm, is the contract of the individual members and not of the firm, and evidence to prove that a third person was also a member of the firm, is inadmissible in a suit on such contract; and such third person is not a necessary or proper party to such suit. *Hilliker et al. v. Francisco et al.*, 598.

PARTITION.

1. PARTITION: WHAT IS NOT A FINAL JUDGMENT IN. Where the judgment is, that partition be made between the parties, and that, for purposes of partition, sale be made of the premises, such a judgment is not final. *Parkinson et al., v. Caplinger et al.*, 290.

2. ———: PRACTICE. Sec. 9, Chap. 104, p. 967, Wag. Stat., gives ample power to the court to set aside such judgment and to admit a third person as a party to the suit, upon his application and affidavit of interest in the premises. *Id.*

3. ———: ———: NEW PARTIES. The trial court commits no error in setting aside, at the same term, such a judgment upon the application of a third person, who claims to own the entire interest in the premises of which partition was sought, and in allowing him to become a party to the suit, where it does not appear that either plaintiffs or defendants were in the actual possession of the land. *Id.*

4. PARTITION SALE: PURCHASE BY PART OWNER: NO WARRANTY OF TITLE. The rule that a sale in partition under a decree of court carries no warranty of title, applies as well when one of the part owners is the purchaser as when a stranger is the purchaser. The maxim *caveat emptor*, applies in either case; and the purchaser takes the land subject to all existing incumbrances. *Stephens v. Ells*, 456.

SEE NUNC PRO TUNC ENTRY, 1.

PARTNERSHIP.

1. INDIVIDUAL CONTRACT: EVIDENCE: PARTIES TO SUIT. A contract running in the name of "R. W. H. and J. F. K. of the firm of H. & K.," though signed in the name of the firm, is the contract of the individual members and not of the firm, and evidence to prove that a third person was also a member of the firm is inadmissible in a suit on such contract; and such third person is not a necessary or proper party to such suit. *Hilliker v. Francisco*, 598.

2. PARTNERSHIP: ASSETS: INDIVIDUAL DEBTS. A partner has no right to appropriate the assets of his firm to the payment of his individual debts, nor to the payment of the individual debts of himself and his co-partner, unless they are also debts of the firm. *Id.*

SEE DOWER, 1, 2.

PAYMENT.

SEE PRINCIPAL AND SURETY, 2, 3, 4.

WARRANTY, 1.

PERJURY.

1. CONFLICTING TESTIMONY ON DIFFERENT TRIALS. A person is guilty of perjury, who willfully, corruptly and falsely testifies upon the

trial of a case that he has not made a certain statement concerning a matter material to the case, although the statement was made by him as a witness on the trial of another case in which it was immaterial. *The State v. Mooney*, 494.

2. PERJURY, INDICTMENT FOR: GRAND JURY. An indictment for perjury in taking a false oath before a grand jury, should express directly that the defendant appeared and was sworn before the grand jury. It is not sufficient that this be stated inferentially or argumentatively. *The State v. Hamilton*, 667.

PERSONAL INJURIES.

SEE NEGLIGENCE, 8.

RAILROAD, 4.

PLEADING.

1. DEFECTIVE TITLE: FRAUD: RESCISSION. In an action on a promissory note given for the price of land, an answer averring failure of consideration in consequence of a defect in the title and fraudulent representations, is insufficient, if it fails to state in what the defect consists, whether a deed has been delivered, and the nature thereof, whether the means of information were not equally open to both parties, and whether plaintiff agreed to deliver possession, and makes no effort to rescind the contract. *Staley v. Ivory et. al.*, 74.

2. DEFECTIVE PLEADING NOT CURED BY VERDICT, WHEN: STATUTE OF JEOFAILS: BILL OF EXCEPTIONS. Defective averment in the petition of matter essential to be proved in order to authorize a verdict for plaintiff, will not be cured by verdict, either at common law or under the statute of jeofails (Wag. Stat. 1836, §§ 19, 20,) when it appears by a bill of exceptions that the evidence offered at the trial did not tend to supply the defect. *International Bank of St. Louis v. Franklin County*, 105.

3. CASE ADJUDGED. Where the petition in a suit upon a county warrant stated the drawing of the warrant in favor of a person other than plaintiff, its delivery, that subsequently for a valuable consideration, plaintiff became the holder and owner, and presented it to the county treasurer for payment, which was refused, but interest was paid thereon, and that the warrant was due plaintiff and unpaid, but failed to aver assignment to plaintiff in the form prescribed by statute, such assignment will not be presumed in support of a verdict and judgment for plaintiff, if the bill of exceptions shows that none such was made. *Id.*

4. ANSWER: ADMISSION. In a suit on an indemnifying bond, the allegation in the petition that plaintiff had been compelled to pay, and had paid $500 for attorney's fees, costs and expenses in defending the subject of the bond, is such an allegation of fact as, unless denied by the answer, will be deemed admitted, and will be held a true statement of the amount of loss actually sustained. *Kansas City Hotel Co. v. Sauer.*

See Common Carrier, 3.

Counter-Claim.

Justice's Court, 1.

Quieting Title.

Railroad, 5, 6.

Replevin, 2.

Special Tax Bill.

PLEADING CRIMINAL.

1. Indictment: statutory language. An indictment need not describe the offense in the language of the statute, but may use words which, in their common acceptation, mean the same thing when spoken of the acts charged against the accused. *The State v. Watson*, 115.

2. Indictment for murder: certainty required in averments as to time and place: "did instantly die" insufficient. An indictment for murder in the first degree, which describes the assault and then charges, that of the mortal wound inflicted by the defendant the deceased "did instantly die," does not state with sufficient certainty the time and place of the death. *The State v. Lakey*, 217.

3. Indictment: certainty of averments as to time, place and parties to the offense. An indictment for murder charged, that "on or about the — day of —, A. D. 1871, at the county of Jasper, in the State of Missouri," defendant and one W. S. "made an assault on H. S. with pistols, &c., * * * and did then and there, on purpose and of *his* malice aforethought, shoot off and discharge at &c., * * * and of the mortal wounds inflicted upon him, the said H. S. did *then and there instantly die.*" *Held*, 1st, that the indictment charges the time and place of the homicide with sufficient certainty; 2d, that it charges the commission of the offense upon both the defendant and W. S. *The State v. Steeley*, 218.

4. Murder: indictment: uncertainty: repugnancy. An indictment for murder, which charges that defendant stabbed the deceased upon the breast and upon the body, giving him four mortal wounds upon his breast and his belly, is not bad for repugnancy, and alleges the locality of the wounds with sufficient certainty. *The State v. Draper*, 325.

5. An indictment which purports on its face to be found by "the grand jurors of the County of Wayne in the State of Missouri" is bad; the Constitution requires all prosecutions to be conducted in the name of the State. *The State v. Cutter*, 503

6. Shooting at a person, indictment for. An indictment for shooting at a person is good, if it charges the offense in the language of the statute (Wag. Stat. 449 § 29). It need not allege an assault. *The State v. Phelan*, 547.

7. AIDING ESCAPE: SUFFICIENCY OF INDICTMENT. An indictment for conveying into jail instruments to aid the escape of a prisoner confined for felony, need not set out the particular felony with which the prisoner was charged. *State v. Addock*, 590.

8. INDICTMENT FOR CRIME JOINTLY COMMITTED. Under Sec. 20 p. 1089 Wag. Stat. it is the duty of a grand jury before which two persons are charged with the commission of crime, in preferring a bill to find it against both; but if for insufficiency of the evidence produced against one, they indict the other alone. the omission will not vitiate the indictment, although it appear upon the trial that the crime was in fact committed by both. *The State v. Steptoe*, 640.

9. PERJURY, INDICTMENT FOR: GRAND JURY. An indictment for perjury in taking a false oath before a grand jury, should express directly that the defendant appeared, and was sworn before the grand jury. It is not sufficient that this be stated inferentially or argumentatively. *The State v. Hamilton*, 667.

10. DATES must be correctly set out in an indictment. *Id.*

SEE ASSAULT, 1.

FORGERY, 1, 3.

ROAD, 1.

POLICE POWER.

1. SUMMARY PROCESS: JURISDICTION MUST APPEAR. A judge's warrant for the destruction of property issued under a statute, which permits condemnation without affording the owner an opportunity for a hearing or trial, must show upon its face the existence of all the facts requisite to authorize its issue. *McCoy v. Zane*, 11.

2. VOID WARRANT: PROTECTION OF OFFICER. Unless it appears on the face of such a warrant ordering the destruction of a gaming device that the property condemned was actually kept or used for gaming purposes, the warrant will be no protection to the officer executing it. *Id.*

POWERS.

SEE WILL, 2.

PRACTICE CIVIL.

1. EVIDENCE. The proper admission of evidence, which was afterwards withdrawn from consideration by an instruction, furnishes no ground for reversal of a case not tried before a jury. *Davis v. Peveler et al.* 189.

2. TRIAL: INSTRUCTIONS. After the jury retired to consiser of their verdict, the judge who presided at the trial, called the jury into the court room a little after dark in the evening, and in the absence of the parties and their attorneys, all other parties being excluded from the court room except the deputy sheriff, gave to the jury additional instructions. *Held*, that such conduct on the part of the court was

a sufficient ground for reversing its judgment. The court should, in its conduct, be careful to prevent suspicion from attaching to its proceedings. *Norton v. Dorsey*, 376.

3. MISJOINDER OF CAUSES OF ACTION: WAIVER. Where no objection is taken, either by demurrer or answer, to a petition on the ground that it unites two distinct causes of action, one against one defendant and the other against the remaining defendants, the objection will be deemed to be waived. *Mead v. Brown*, 552.

4. FAILURE TO SUGGEST MARRIAGE OF A PARTY. Where the failure to suggest the marriage of a female defendant, occurring after the suit is brought, and to bring in the husband as a party to the suit, can in nowise imperil the interests or affect the rights of a co-defendant, the Supreme Court will not, at this instance, reverse the judgment for this irregularity. *Id.*

SEE AMENDMENT, 1, 2.

APPEAL, 1, 2, 3.

BILL OF EXCEPTIONS.

COVENANT, 1.

EVIDENCE, 2.

EXECUTION, 3.

EXHIBIT, 1, 2.

HUSBAND & WIFE, 1.

INJUNCTION, 1.

JURY, 1.

PARTITION, 2, 3.

PRACTICE, CRIMINAL.

1. WANT OF PROSECUITON: DISCHARGE OF PRISONER: CHANGE OF VENUE Where a criminal case is taken by change of venue from one county to another on the application of the accused, he is not entitled to a discharge as for want of prosecution, if tried at the second term of the court of the latter county after the filing of the papers in that court. *The State v. Cox*, 29.

2. The Supreme Court will not reverse a judgment because the prisoner was not tried within the period fixed by the statute, (Wag. Stat. 1105, §§ 27, 28, 29,) unless it appears by the record that he applied to the lower court for a discharge on that ground. *Id.*

3. TRIAL: PRESENCE OF PRISONER. Unless it affirmatively appears from the record in a criminal case, that the prisoner was present during the progress of the trial and at the rendition of the verdict, a judgment against him will be reversed. *The State v. Able*, 37.

4. JURORS: PEREMPTORY CHALLENGES: STATE MUST ANNOUNCE HERS FIRST. In criminal cases the State must announce her peremptory challenges of jurors before the defendant can be required to announce his. *The State v. Steeley*, 218.

5. NEWLY DISCOVERED EVIDENCE. The Supreme Court will not disturb a judgment of conviction in a criminal case, because the trial court overruled a motion for a new trial based on newly discovered evidence, when the evidence does not tend to prove any matter of defense, but merely to impeach a witness for the State, if it appears that defendant knew before the trial that the testimony of such witness would be taken against him, notwithstanding it may also appear that he had previously made to others statements contradictory to what he testified to on the trial. *The State v. Robert J. Smith*.

6. OBJECTIONS TO EVIDENCE. It is the duty of the court to see that innocent men are not convicted of crime; and, therefore, if improper evidence is offered by the State in a criminal case, the court must exclude it, whether objections made on behalf of the defendant are proper or not. *The State v. O'Connor*, 374.

7. RECORD. When the record in a criminal case shows neither indictment, arraignment, trial nor verdict, the judgment of conviction will be reversed. *The State v. Pickles*, 431.

8. READING REPORTS IN PRESENCE OF THE JURY. It is no error for a court, in ruling on questions presented during the progress of criminal trial, to read from the reported decisions of the Supreme Court in the presence and hearing of the jury. It is a matter of practice within the discretion of the trial court, and not subject to review in the appellate court. *The State v. Dearing*, 530.

9. NEW TRIAL: CUMULATIVE EVIDENCE. Newly discovered evidence, which is merely cumulative in its character, is no cause for a new trial. But this rule might be relaxed in a case where the State should attack or bring in doubt the evidence, which the cumulative evidence would tend to confirm. *The State v. Evans*, 574.

10. INSTRUCTIONS. When an indictment charges one offense and does not allege the facts necessary to constitute another, it is error for the court to give the jury instructions, which will authorize a conviction of the latter, even though the evidence may tend to show defendant to be guilty of that offense. *The State v. Arter*, 653.

SEE CONTINUANCE.

EVIDENCE, 7.

INSTRUCTIONS, 3.

JEOPARDY.

MURDER, 3.

NEW TRIAL, 3.

VENUE, 1.

WITNESS, 5, 6, 7.

PRACTICE IN THE SUPREME COURT.

1. VERDICT: EVIDENCE. Where there is no evidence to support the

verdict, the Supreme Court will reverse the judgment. *Harlan v. St. Louis, K. C. & N. R'y Co.*, 22.

2. VERDICT: SEVERAL COUNTS. A judgment on a petition consisting of several counts will not be reversed because the verdict does not contain a separate finding on each count, unless the attention of the trial court was distinctly called to this defect by appropriate motion. *Sweet v. Maupin*, 65.

3. FORMAL DEFECTS, PATENT OF RECORD. No judgment should be reversed for merely formal defects, though patent of record, unless opportune advantage was taken of them in some appropriate law. *Id.*

4. REVIEWABLE ERRORS: MOTION FOR NEW TRIAL. The Supreme Court will not review the action of the trial court in overruling a motion to dismiss the suit on the ground that the charter of the plaintiff corporation had expired, and in permitting a substitution of parties and revival of the suit, unless these were assigned as errors in a motion for new trial. *McCoy et al. v. Farmer et al.* 244

5. The Supreme Court cannot undertake to review the finding of the trial court based on facts, where no declarations of law are asked, and none given, and where it is impossible to know upon what theory the trial court acted in coming to its conclusions. *Parkinson et al. v. Caplinger*, 290.

6. PRACTICE IN THE SUPREME COURT. The fact that the trial court, after refusing to non-suit the plaintiff, at the instance of defendant instructed the jury for nominal damages, in consequence of which there was a verdict and judgment against defendant for one cent, from which he took no appeal, does not, on appeal by the plaintiff, preclude the defendant from asserting, against the efforts of the plaintiffs to set the same aside, that they are not wronged thereby, but on the contrary have obtained more than in strictness they were entitled to, and that on the pleadings and evidence they were really entitled to nothing. *Randle et al. v. Pacific Railroad*, 325.

7. CRIMINAL PRACTICE: BILL OF EXCEPTIONS: EVIDENCE. The Supreme Court will not inquire, whether the verdict in a criminal case is against the evidence, unless the whole of the evidence is preserved in the bill of exceptions. It is not sufficient that its substance is stated. *The State v. Fritterer*, 422.

8. JUDGMENT. Where the grounds upon which a probate court acted in overruling a motion to compel an administrator to make an inventory of real estate, do not appear in the record or in a bill of exceptions, the presumption is in favor of the correctness of the judgment, which will, therefore, be affirmed by the Supreme Court. *Helm v. Gore, Admin'r*, 430.

9. JURY TRIAL: MOTION FOR NEW TRIAL. The Supreme Court will not reverse a judgment for refusal of the lower court to allow a trial by jury, unless the record shows that such refusal was made a ground of exceptions, or unless it appears that the appellant may have been prejudiced by such refusal. *Ward v. Quinlivin*, 453.

10. VERDICT. Though the evidence may not be clear and direct in support of a verdict, yet, if there was sufficient evidence to author-

ize the trial court to submit the issues to the jury, the Supreme Court will not disturb the judgment. *Schulenberg v. Boothe et al.*, 475

11. SUPPLYING IMPERFECTIONS IN THE TRANSCRIPT. An imperfect transcript of the record of the trial court cannot be perfected in the Supreme Court by merely bringing up, without *certiorari* or agreement of parties, an additional transcript sworn to contain, as near as the affiant can recollect, the full contents of the missing paper. *Baker v. Loring*, 527.

12. ERROR CORAM NOBIS: ABUSE OF DISCRETION OF TRIAL COURT. A motion to vacate and set aside a judgment on the ground that, at the time of its rendition, the court had no jurisdiction of defendant's person, may be regarded in the nature of a writ of error *coram nobis*, or as warranted by the statute authorizing a motion for this purpose to be filed within three years after the rendition of the judgment. If on the trial of such motion no evidence is given, tending to show either service of the writ or the appearance of the defendant, personally, or by an authorized attorney, but, on the contrary, it appears affirmatively, from the return of the officer that the defendant was not served with notice, and from the evidence of the attorneys who were employed by the other defendants, and who had filed an answer for the defendants without specifying which of the defendants they represented, that they had never been employed as attorneys by the defendant seeking to set aside the judgment, this court will reverse the judgment, as it is clear that the discretion of the trial court has been abused. *Craig et al. v. Smith et al.*, 536.

13. GENERAL VERDICT ON SEVERAL COUNTS. The Supreme Court will reverse a judgment, when the verdict is a general verdict on a petition which states distinct causes of action, and the attention of the trial court has been directed to the error. *Sturgeon v. St. Louis, K. K. C. & N. R'y Co.*, 569.

14. AMENDMENT OF RECORD ON APPEAL: VERDICT. Annexed to the record in a case was a certificate of the clerk of the trial court, purporting to give the verdict really rendered by the jury, which differed from that set out in the record. This certificate was followed by an agreement of the attorneys of the respective parties, that the record should be considered as amended in conformity therewith. This verdict nowhere appeared in the record; and the agreement did not seem to have been filed as a stipulation, and was not brought to the attention of the trial court on the motion for a new trial; *Held*, that the Supreme Court would treat the verdict set out in the record as the true verdict. *The State v. Steptoe*, 640.

SEE NEW TRIAL, MOTION FOR.

PRESUMPTIONS.

1. A deed will be presumed to have been properly excluded from evidence, when the reasons for its exclusion do not appear in the record. *Cockrell v. Proctor et al.*, 41.

2. PRESUMPTION OF CORRECTNESS OF OFFICIAL ACTION. Nothing appearing to the contrary, it will be presumed that an order for a writ of *venditioni exponas* in a civil case, which appears by the record to

have been made at a special term of court, was made at a special term, regularly held for the transaction of the general business of the court, and not at one appointed for the sole purpose of trying persons confined under criminal process, and at which no civil business can be lawfully transacted. *Hicks v. Ellis et al.* 176.

3. SHERIFF'S DEED: SCHOOL MORTGAGE: COUNTY COURT: PRESUMPTION: DESTRUCTION OF RECORDS. A sheriff's deed purporting on its face to have been executed by virtue of an order of some court, which assumed the right to order the sale of land mortgaged to secure the payment of school money, will be presumed to have been executed under an order of the county court, though that court is not expressly named, where it appears by parol evidence that, before the date of the deed, the owner of the land described in it had borrowed school money from the county court, and had given a mortgage upon real estate to secure its payment, under which mortgage a sale had been made by the sheriff by order of that court and that afterward the sheriff had died, and all the records of the county had been destroyed. *Davis v. Peveler, et al.*, 189.

4. JUDGMENT. Where the grounds upon which a probate court acted in overruling a motion to compel an administrator to make an inventory of real estate, do not appear in the record or in a bill of exceptions, the presumption is in favor of the correctness of the judgment, which will, therefore, be affirmed by the Supreme Court. *Helm v. Gore, Admr.* 430.

SEE CRIMINAL LAW, 1.

EVIDENCE, 4.

PRINCIPAL AND AGENT.

1. AGENT TO SELL: IMPLIED POWERS. An agent authorized to sell goods on commission has no implied power to barter or exchange them, or to pledge them for his own debt. He may receive payment in the ordinary modes of business, but cannot change the security for goods sold, or make himself the debtor of his principal in lieu of the purchaser. *Wheeler & Wilson Man. Co. v. Givan*, 89.

2. In suit upon a note given for the purchase money of a sewing machine bought of plaintiff's agent, it is no defense that the maker has furnished board to the agent in payment of the note under an agreement made at the time of the sale, where it appears that the maker had notice that the agent was not authorized to make such agreement and the plaintiff never consented to it. *Id.*

3. CONTRACT. A city is not liable for work done upon a street by a contractor in excess of the amount fixed by his contract, though the extra work is ordered by the supervisor appointed by the city to superintend the execution of the contract. *Leathers v. The City of Springfield*, 504.

4. CASE ADJUDGED. A contract for street work required macadam to be laid twenty-four feet wide, eight inches thick at the center and gradually less to the outer limit on either side, where it should be four inches thick, and to be measured and spread upon the street as the city committee might direct; payment to be made at an agreed price per cubic foot; *Held*, 1st, that the intent of the con-

tract was to have macadam spread to the average depth of six inches; 2d, that an instruction to the jury that, in order to ascertain the amount spread, they should multiply the length, breadth and average depth as fixed by the contract in feet, and divide by twenty-seven, laid down a correct rule of measurement; and evidence having been offered to show that under the direction of a supervisor appointed by the committee to superintend the work, the macadam had been spread to a greater average depth than six inches; *Held*, 3d, that the contractor could not recover for the excess. *Id.*

See Attorney and Client, 2.

PRINCIPAL AND SURETY.

1. Creditor's release of securities: effect on surety. Release by a creditor of part of the land mortgaged to him as security for payment of a bond, does not discharge a surety in the bond, though made without his consent, if the remainder of the land is sufficient to indemnify him against loss. *Saline County v. Buie et al.* 63.

2. Renewal note: payment of interest: discharge of surety. The payment of interest in advance after the maturity of a note is not, by itself, evidence of an agreement for an extension of the note, but the taking of a renewal note from the principal debtor, and receiving interest upon it from its date to its maturity is evidence of a contract to receive it in payment of the original or for delay on the original until the maturity of the renewal note; and, unless rebutted, is conclusive evidence, and the effect of it is to discharge a surety on the original note. *First National Bank of Springfield v. Leavitt et al.* 562.

3. Renewal note received as conditional payment. When the creditor receives the renewal note as conditional payment, he thereby agrees that, if it be paid at maturity, the original shall be satisfied, and assumes an obligation to wait upon the makers of the original until the maturity of the renewal note. *Id.*

4. The taking of a renewal note from the principal debtor, by way of conditional payment of an existing note and the receipt of interest in advance upon it, amount to an extension of the original and effect a discharge of the surety. *Id.*

5. Attachment: forthcoming bond. The surety in a forthcoming bond is not relieved by the action of the court in quashing the attachment writ, if, at the same term and within four days after the order is made, it is set aside, although, between the making and the setting aside of such order, the surety returns to the defendant in the attachment suit money held by him as an indemnity. *Hubbard v. Hennings, Exr.* 647.

PROBATE COURT.

1. Probate court judgments and jurisdiction. The probate courts of this state are courts of record, and their jurisdiction in respect to wills and the administration of the estates of deceased persons, is general, exclusive and original; and whilst any action on subjects not committed to their jurisdiction is of no force or validity,

their action on these subjects is entitled to the same weight as that of any other court of record, and is conclusive in all collateral proceedings. *Johnson et al. v. Beazley*, 250.

2. ADMINISTRATOR'S APPOINTMENT CAN NOT BE QUESTIONED COLLATERALLY. The appointment of an administrator can not, in a collateral proceeding, be invalidated by proof that the deceased, at the time of his death, had his place of abode in a county other than that in which the appointment was made. *Id.*

3. THE probate court, when it is not otherwise provided by law, has exclusive original jurisdiction in all cases relative to the probate of last wills and testaments and its judgment, rejecting or probating a will, cannot be attacked, collaterally. *Banks et al. v. Banks et al.*, 432.

SEE JUDGMENT, 1, 2, 3.

PROCESS.

SEE POLICE POWER, 1, 2.

SHERIFF, 1.

SUMMONS, 1.

PROMISSORY NOTE.

1. STATUTE OF LIMITATIONS: DAYS OF GRACE. The statute of limitations does not begin to run against a promissory note until three days after the date, when, by its terms, it is due. *McCoy v. Farmer*, 244.

2. PRINCIPAL AND SURETY: RENEWAL NOTE: PAYMENT OF INTEREST: DISCHARGE OF SURETY. The payment of interest in advance after the maturity of a note, is not, by itself, evidence of an agreement for an extension of the note; but the taking of a renewal note from the principal debtor, and receiving interest upon it from its date to its maturity, is evidence of a contract to receive it in payment of the original, or for delay on the original until the maturity of the renewal note; and, unless rebutted, is conclusive evidence, and the effect of it is to discharge a surety on the original note. *First National Bank of Springfield v. Leavitt et al.*, 562.

3. RENEWAL NOTE RECEIVED AS CONDITIONAL PAYMENT. When the creditor receives the renewal note as conditional payment, he thereby agrees that, if it be paid at maturity, the original shall be satisfied, and assumes an obligation to wait upon the makers of the original until the maturity of the renewal note. *Id.*

4. THE taking of a renewal note from the principal debtor, by way of conditional payment of an existing note and the receipt of interest in advance upon it, amount to an extension of the original and effect a discharge of the surety. *Id.*

5. ONE who writes his name on the back of a note, of which he is neither payee or endorsee, before it is delivered, is, in the absence of extrinsic evidence, to be treated as a maker. *Semple et al. v. Turner*, 696.

PROSECUTING ATTORNEY.

1. PROSECUTING ATTORNEY: TIE VOTE: NEW ELECTION. In the case of a tie vote in the election of a prosecuting attorney, the Governor, and not the sheriff is the proper officer to order a new election. *State ex rel. Speck v. Geiger*, 306.

QUIETING TITLE.

POSSESSION: CLAIM OF TITLE: PLEADING. In the statutory proceeding to quiet title to land, when the question of possession is raised by the pleadings, the defendant is entitled to have it tried, although the answer contains no affirmative claim of title in him, if it does not deny the allegation of the petition that he makes such claim. *Babe v. Phelps*, 27.

ROADS.

1. INDICTMENT AGAINST CONSTABLE FOR FAILURE TO COLLECT ROAD TAX. An indictment against a constable for failing to collect a road tax, placed in his hands for collection by the overseer, is worthless, if it omits to allege the making of an order by the county court, designating the number of days each person, liable to work on public roads, shall work. *The State v. Kopper*, 478.

2. NON-USER BY THE PUBLIC: ADVERSE POSSESSION BY AN OBSTRUCTOR: LIMITATIONS: CRIMINAL LAW. The non-user, for a period of ten years, of a road which the public has acquired a right to use as a state road by virtue of legal proceedings, had under an act of the legislature, does not amount to an abandonment of the easement, so as to authorize the owner of the fee to inclose it; nor does the fact that he has for a like period maintained a fence across it entitle him to the possession of the roadway. Notwithstanding such non-user or inclosure for that period, he is liable to a criminal prosecution for obstructing the highway, if he maintains or continues to maintain a fence across the road. *The State v. Culver*, 607.

3. MANDAMUS. Sec. 25, 1223 Wag. Stat. invests the county court with a judicial discretion to determine whether or not a proposed road will be of sufficient public utility to justify the payment by the county of the damages assessed by a jury. It also permits the petitioners for the road to pay the damages themselves, and in case they do, makes it the duty of the county court to open the road; *Held*, that a writ of mandamus will not lie to compel the court to open a road at the expense of the county, nor to open it at the expense of the petitioners, unless they have voluntarily paid the damages; *Strahan v. County Court of Audrain County*, 644.

4. ROAD OVERSEER: TAXATION: TOWNSHIP ORGANIZATION. Under the township organization law (Acts 1873, p. 105, Art. 9; p. 107, Art. 11) a road overseer has no authority to incur a debt in keeping the highways in repair, beyond the amount of the fund derived from the taxes levied by the township board; and if his expenditures exceed that amount, he cannot recover the excess from the township. *Buell v. Virgil Township*, 657.

ROBBERY.

VERDICT. On an indictment for robbery in the first degree, containing but one count, the jury found, by their verdict, that defendant was guilty of robbery, and assessed his punishment at ten years imprisonment in the penitentiary, and there was judgment accordingly; *Held*, that the verdict was sufficient to support the judgment, although it failed to specify the degree of the crime of which it found defendant guilty. *The State v. Steptoe*, 640.

SALE

SEE PRINCIPAL AND AGENT, 1, 2.

WARRANTY, 1.

SCHOOLS.

1. SCHOOL DISTRICTS, EXTENSION OF: CONSTITUTION. The act authorizing boards of education in cities, towns and villages to extend the limits of the territory attached for school purposes, beyond the corporate limits (Sess. Acts 1868 p. 163-4) is constitutional, although it does not require the consent of the districts affected by such extension. *State ex rel. v. Miller*, 50.

2. ———. THE board of education of a town which has been organized into a special school district may, under this act, by resolution annex additional territory, although previous to such annexation the district did not extend beyond the limits of the town. *Id.*

3. TAXATION: CONSTITUTION. Sec. 8, Art. 9, Constitution of 1865, amounts to a mandate to the legislature to provide the means of sustaining a free school in each district in the State at least four months in each year, but does not prohibit a larger provision. *Id.*

4. SHERIFF'S DEED: SCHOOL MORTGAGE: COUNTY COURT: PRESUMPTION: DESTRUCTION OF RECORDS. A sheriff's deed purporting on its face to have been executed by virtue of an order of some court, which assumed the right to order the sale of land mortgaged to secure the payment of school money, will be presumed to have been executed under an order of the county court, though that court is not expressly named, where it appears by parol evidence that, before the date of the deed, the owner of the land described in it had borrowed school money from the county court, and had given a mortgage upon real estate to secure its payment, under which mortgage a sale had been made by the sheriff by order of that court, and that afterwards the sheriff had died, and all the records of the county had been destroyed. *Davis v. Peveler et al.*, 189.

5. TOWN SCHOOL DISTRICTS. Outlying territory adjacent to a town may be organized with the town into a single school district under the statute (Wag. Stat. p. 1262 § 1), without having been previously attached to the town for school purposes. *State ex rel. School District No. 3, &c., v. Mayview Board of Education*, 587.

SEAL.

1. RECORD OF DEED. Where the official certificate of acknowledgment of a deed states that the seal of office is attached to the same, the mere omission of the officer recording the deed to copy the seal, will not vitiate nor render invalid the record copy as evidence. *Parkinson v. Caplinger*, 290.

2. ORIGINAL DEED. An original deed showing that a seal was attached to the official certificate of acknowledgment, and, also, that a seal was attached to the signature of the grantor, is properly admitted in evidence, though the record copy of the deed shows neither of these facts. *Id.*

3. NOTICE: RECORD OF DEED. The record of a deed, showing the lack of a seal, imparts notice of an equitable interest, at least, in the lands therein described. *Id*

4. ATTACHMENT BOND: SEAL. An instrument given as an amended attachment bond, but not sealed, and not having the word "seal" incorporated in it, is inoperative as a bond, and cannot supersede the original bond, or render it inoperative. *State ex rel. Gilbert v. Eldridge*, 584.

SEIZIN.

SEE COVENANT, 1, 2, 3, 4.

SET-OFF.

ATTACHMENT BOND. UNLIQUIDATED DAMAGES. In a suit upon an attachment bond, the defendant cannot assert, as a set-off, the unliquidated damages arising from a breach of the covenents of a lease. *State ex rel. Gilbert v. Eldridge*, 584.

SHERIFF.

1. SHERIFF INTERESTED: CORONER. A sheriff who owns stock in a corporation, has no such interest as will disqualify him, either at common law or under the statute concerning coroners (Wag. Stat 284, § 3) from executing process in a case to which the corporation is a party. *Hardwick v. Jones et al.*, 54.

2. JUDICIAL SALES: SHERIFF INTERESTED. A purchase by a corporation at execution sale is not void because the sheriff conducting the sale is at the time a stockholder in the corporation. *Id.*

3. WHERE a sheriff advertises and sells an entire tract of land under an order of sale made by the court in a partition suit, which only empowers him to sell the half of said tract, and the fact of such sale is reported by him to the court, and the purchaser pays to him the full purchase price for the entire tract without knowledge of his want of authority, the purchaser can, on a proper case made in his petition, recover of the sheriff, by way of damages, to the extent of the loss sustained through such neglect or misfeasance. *Lusk v. Briscoe*, 555.

4. PARTITION SALE: DAMAGES. It is the duty of the sheriff to execute and deliver to the purchaser at a partition sale, who has paid to him the purchase price, a deed conveying the interest of the parties in the partition proceeding, and his refusal to execute the deed under such circumstances will render him liable to an action by the purchaser; but in such action, unless special damages be alleged and proved, the recovery should be nominal only. *Id.*

SEE UNITED STATES SUCCESSION TAX, 3.

SHERIFF'S DEED.

SEE SCHOOLS, 4.

SHOOTING.

1. SHOOTING AT A PERSON, INDICTMENT FOR. An indictment for shooting at a person is good, if it charges the offense in the language of the statute (Wag. Stat. 449, § 29). It need not allege an assault. *The State v. Phelan*, 547.

SPECIAL JUDGE.

SPECIAL JUDGE. The act of 1877 authorizing the trial of a criminal cause, pending in any circuit court, by a special judge selected by the attorneys of the court from their own number, when the judge of the court is of kin to the defendant, or is interested or prejudiced, or has been of counsel, or will not give defendant a fair trial, is constitutional. (Sess. Acts 1877, p. 357.) *The State v. Able*, 357.

QUIETUS OF COUNTY CLERK TO COLLECTOR.

SEE COLLECTOR'S SETTLEMENT.

RAILROADS.

1. DANGEROUS CROSSINGS: VIGILANCE REQUIRED OF COMPANY AND THE PUBLIC. Where a railroad company has a dangerous crossing in a crowded city, it must exercise a degree of care to avoid injuring persons and property commensurate with the danger of accident; on the other hand, persons using such a crossing must exercise care and watchfulness commensurate with the danger to which they are exposed. *Harlan v. St. Louis, K. C. & N. R'y Co.*, 22.

2. RAILROAD FENCE LAW CONSTRUED: FAILURE OF COMPANY TO MAINTAIN LAWFUL FENCE ADJOINING ENCLOSED FIELD EXCUSED, WHEN. A railroad company which, under an agreement with the owner of an enclosed and cultivated field, omits to maintain a lawful fence along its road, where it passes through such field, as required by the statute (Wag. Stat. 310 § 43) is liable for the killing of a stranger's cattle getting into such field and thence upon the road, unless the field is itself enclosed by a lawful fence. *Berry v. St. Louis, S. L. & R. R. R. Co.*, 172.

LAW LIBRARY OF University of MICHIGAN.

3. POLICY OF THE STATUTE. The duty of fencing the sides of its road, where it passes through enclosed and cultivated fields, is imposed by the statute upon the railroad company for the benefit of adjoining proprietors, and not for the benefit of strangers. *Id.*

4. MACHINERY: NEGLIGENCE: FELLOW SERVANT; PERSONAL INJURY. A railroad company is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake. The inspector represents the company, and is not a fellow servant of the brakeman. *Long v. Pacific R. R.*, 225.

5. FORTY-THIRD SECTION OF THE RAILROAD LAW: PLEADING; EVIDENCE: NEGLIGENCE. In an action against a railroad company for killing stock the petition alleged that the defendant carelessly and negligently ran its train over the stock, and that the point on the road where this occurred was not at the crossing of any public road or highway, and was at a point where the railroad ran through unenclosed prairie lands, and was not fenced; *Held*, 1st, that the action was based exclusively on the 43rd section of the railroad law; 2nd, that evidence of negligence in running the train, or evidence to prove that the killing occurred within eighty rods of a public crossing, and that the whistle was not blown or the bell rung, as required by the 38th section, was irrelevant. *Collins v. Atlantic and Pacific R. R. Co.*, 230.

6. PLEADING. In an action brought under Sec. 43, Wag. Stat. p. 310, for killing cattle, *Held*, that a statement filed with a justice, charging that, where the accident occurred, the defendant's road was "*unfenced*" merely, stated no facts constituting a cause of action under said section. This section applies only to those localities where the law requires the railroad to be fenced. *Davis v. The Missouri, Kansas & Texas Railway Co.*, 441.

SEE COMMON CARRIER, 1, 2.

CORPORATION, 1, 2.

COUNTY BONDS.

NEGLIGENCE, 1, 2, 3, 4, 5, 7.

SWAMP LANDS, 4.

TAXES, 1, 2, 3, 5.

RECITAL.

COUNTY SUBSCRIPTION TO STOCK OF RAILROAD COMPANY: RESCISSION OF ORDER OF SUBSCRIPTION: RECITALS. Where a county court makes an order for the subscription of stock to a railroad company, upon condition, that the road shall be built within a specified time; *Held*, that it is in the power of the county court, by a subsequent order, to suspend the delivery of bonds of the county, issued in payment of the subscription, and remaining in the hands of a trustee, when it appears that the road has not been built within the time specified; the recitals in the order, however, like any other declarations made by one party to a contract, do not conclude the other party. *Cooper v. Sullivan County et al.*, 542.

SEE ADMINISTRATION, 5.

RECORD OF DEEDS

RECORD OF DEED: WHAT DESCRIPTION OF THE LAND IS SUFFICIENT TO IMPART NOTICE. In order that the record of a deed may impart notice to subsequent purchasers, the description of the land conveyed should be such that it can be identified by name, location, monuments, courses and distances or numbers, or the deed should refer to some other instrument lawfully of record, which does contain such means of identification. Mere reference to a certificate of entry at a United States land office, which embraces large bodies of land and is not recorded, without even designating the land as lying in the county where the deed is recorded, is not a sufficient description. *Gatewood v. House*, 663.

SEE DEED, 1, 2. 3.

RELATION, THE DOCTRINE OF.

IRREGULAR EXECUTION, HOW CURED. Where injustice will be done to one party by permitting another to take advantange of a technical irregularity in an execution, growing out of the fact that the judgment of the circuit court was irregularly affirmed by the appellate court, a subsequent regular affirmance will be held to relate back, so as to cure the irregularity in the execution. The doctrine of relation will not be invoked to maintain injustice; but is often relied on to prevent the perpetration of gross wrong. *Slagel Admr, v. Murdock*, 522.

RELEASE.

SEE PRINCIPAL AND SURETY.

REMITTITUR.

SEE COSTS.

REPLEVIN.

1. MEASURE OF DAMAGES: EXECUTION. Plaintiff, claiming to be the owner of certain billiard tables, which had been taken in execution by the sheriff as the property of another, gave bond and replevied them. Upon a trial plaintiff failed to establish his claim, and there was judgment for defendant for the value of the tables, together with damages for taking and detaining them; *Held*, that this was the proper measure of recovery, and that the recovery should not have been limited to the amount of the execution. *Schulenberg v. Boothe*, 475.

2. REPLEVIN IN JUSTICE'S COURT: DEFECTIVE STATEMENT: POWER OF CIRCUIT COURT TO PERMIT AMENDMENT. In an action brought in a justice's court under the statute concerning the claim and delivery

of personal property (Wag. Stat. 817), an affidavit to plaintiff's statement which omits to say that the property claimed has not been seized under any process, execution or attachment against the property of plaintiff, is defective; and the circuit court, on appeal, has no power to permit it to be amended. *Madkins v. Trice*, 656.

RESCISSION.

1. LANDS; SALE, RESCISSION OF; OUSTER IN PAIS. If a vendee of land, holding possession under an executory contract of sale, surrenders the possession to a stranger as owner of the paramount title without suit and in the face of the vendor's promise to make the title good, he cannot afterwards demand a rescission of the contract. *Lockwood v. Hann. & St. Jo. R. R. Co.*, 233; *Cooper v. Same*, 238.

2. If one of several joint obligors in a title bond for land, becomes unable to convey according to the contract, failure on the part of the obligee, during the continuance of such disability, to assert his right, will not authorize a co-obligor, who is under no such disability, to rescind the contract so far as it concerns himself. *Melton v. Smith*, 315.

3. RESCISSION OF CONTRACTS. The right to rescind must be promptly exercised, otherwise it will be deemed waived, and the intention to rescind must be shown by some overt act or outward manifestation. *Id.*

4. FRAUD: FAILURE OF TITLE. The courts will not decree the rescission of an executed contract for the sale of land, except on the ground of actual fraud. Mere failure of title in the grantor will not authorize such a decree. *Hart v. Hannibal & St. Joseph Railroad Company*, 509.

SEE PLEADING, 1.

RES GESTÆ.

SEE EVIDENCE.

RES JUDICATA.

SEE EVIDENCE, 3.

HOMESTEAD, 1.

SPECIAL TAX BILL.

1. PLEADING. Where a city charter provides that, whenever the mayor and city council shall order side-walks, &c., within the limits of the city, the cost of the same shall be paid by the owners of the property in the vicinity, as may be further provided by ordinance; and that whenever such work shall have been fully completed under the authority of ordinance, the city engineer shall

compute the cost thereof and assess it as a special tax against the adjoining property fronting upon the work done, and each lot of ground shall be charged in proportion to the frontage thereof, &c.; *Held*, that in a suit upon a special tax bill for paving a side-walk in front of defendant's lot in said city, a petition, which does not allege that the work out of which the tax bill originated, was done by virtue of an ordinance passed by the mayor and city council, and that the city engineer, in computing the cost of the work, only charged defendant's lot in proportion to the frontage thereof, is defective in not containing these allegations, both of which are material, and that a demurrer to the petition because of the want of either of these allegations was properly sustained. *Irvin v. Devors*, 625.

SPECIFIC PERFORMANCE.

1. STATUTE OF FRAUDS. When acts of part performance and casual statements of a deceased person are the sole proof relied on to establish a contract with the deceased for the conveyance of land, in order to take the case out of the statute of frauds, and authorize a court to decree specific performance against the heirs, the acts and statements should be such as would be inconsistent with any other contract than the one alleged. The court should be well satisfied of the existence and character of the agreement, and will always look to the substantial justice of the case. *Sitton v. Shipp*, 297.

2. ABANDONMENT OF CONTRACT; EVIDENCE. In a suit to compel specific performance of a contract to convey land, evidence of mere verbal declarations of the plaintiff that he intended to abandon the contract, should be received with great caution. *Melton v. Smith*, 315.

STATE BOARD OF EQUALIZATION.

1. STATE TREASURY: APPROPRIATION. Members of the State Board of Equalization are not entitled to warrants on the treasury for services performed, when there are no funds appropriated to pay for such services. *State ex rel. v. Holladay*, 76.

STATE TREASURER.

SEE STATE BOARD OF EQUALIZATION.

STATUTES.

SEE APPEAL, 2.

ATTACHMENT, 7.

STATUTES CONSTRUED.

WAGNER'S STATUTES OF 1872.

Page 181, §§ 2, 6. See Attachment, 1.
" 310, § 43. " Railroads, 5, 6.
" 415, § 34. " County Warrant.
" 449, § 29. " Shooting.
" 450, § 23. " Assault, 1.
" 480, § 27. " Aiding Escape.
" 503, §§ 24, 27. " Gaming Device.
" 542, § 23. " Dower.
" 615, § 67. " Execution, 3.
" 917, § 7, " Limitations, 2.
" 935, § 14, " Hus &Wife, 1,3,4.
" 999, § 2. " Assignment.
" 1032, § 24. " Injunction, 2.
" 1041, §§ 29, 32. " Bill of Except'ns.
" 1100, § 41. " Venue, 2.
" 1114, §§ 1,2,13,14. " Writ of Error, 1.
" 1223, § 25. " Road, 3.
" 1262, § 1. " Schools, 1, 5.
" 1273, § 1. " Set-off.
" 1345, § 1. " Trespass.

GENERAL STATUTES OF 1865.

Page 436, § 7. See Coal Oil Inspector.
" 443, § 12. " Husband and Wife, 2.

REVISED STATUTES OF 1855.

Page 371, § 7. See Corporation, 2.
" 438, §§ 56, 57, " " 2.

ACTS OF 1873.

Page 105, art. 9, and page 107, art. 11. See Road, 4.

ACTS OF 1868.

Page 42. See County Bonds, 1.
" 72, §§ 24, 25. " Swamp Lands, 2.

ACTS OF 1863

Page 20. See Execution, 2

STATUTE OF FRAUDS.

See Specific Performance, 1.

STOLEN PROPERTY

See Criminal Law, 1.

Evidence, 4.

STREETS.

1. Contract: agency. A city is not liable for work done upon a street by a contractor in excess of the amount fixed by his contract, though the extra work is ordered by the supervisor appointed by the city to superintend the execution of the contract. *Leathers v. The City of Springfield*, 504.

2. Case adjudged. A contract for street work required macadam to be laid twenty-four feet wide, eight inches thick at the center and gradually less to the outer limit on either side, where it should be four inches thick, and to be measured and spread upon the street as the city committee might direct; payment to be made at an agreed price per cubic foot; *Held*, 1st, that the intent of the contract was to have macadam spread to the average depth of six inches; 2d, that an instruction to the jury that, in order to ascertain the amount spread, they should multiply the length, breadth and average depth as fixed by the contract in feet, and divide by twenty-seven, laid down a correct rule of measurement; and evidence having been offered to show that under the direction of a supervisor appointed by the committee to superintend the work, the macadam had been spread to a greater average depth than six inches; *Held*, 3d, that the contractor could not recover for the excess. *Id.*

See Nuisance, 1.

SUCCESSION.

See United States Succession Tax.

SUMMARY PROCESS.

1. POLICE POWER: SUMMARY PROCESS: JURISDICTION MUST APPEAR. A Judge's warrant for the destruction of property issued under a statute, which permits condemnation without affording the owner an opportunity for a hearing or trial, must show upon its face the existence of all the facts requisite to authorize its issue. *McCoy v. Zane*, 11.

2. VOID WARRANT: PROTECTION OF OFFICER. Unless it appears on the face of such a warrant ordering the destruction of a gaming device that the property condemned was kept or used for gaming purposes, the warrant will be no protection to the officer executing it. *Id.*

SUMMONS.

1. SUMMONS, SUFFICIENCY OF: Under a statute which requires that the writ of summons shall command the officer to summon the defendant "to appear in court on the return day of the writ, and at a place to be specified in such writ, to answer the petition of the plaintiff," (*R. S.* 1855, 1,222 § 6) a writ is substantially sufficient which commands the sheriff to summon the defendant to be and appear before the judge of the H. county circuit court at F. in H. county, on the first Monday of June next, and answer the petition of N. C., plaintiff, and have you then and there this writ. *Hicks v. Ellis, et al.*, 176.

SURPRISE.

SEE PRACTICE, CIVIL.

SWAMP LANDS.

1. TITLE PASSES WITHOUT PATENT, WHEN. Under the act of Congress of September 28th, 1850, (U. S. R. S. §§ 2479–81) when any tract of land has been selected as swamp land, the selection approved by the Secretary of the Interior, and the land accepted by the Governor, the title becomes thereby vested in the State, without any patent from the general government. *Masterson v. Marshall*, 94.

2. RELINQUISHMENT OF THE STATE'S TITLE: INDEMNITY PROVIDED BY ACT OF CONGRESS OF MARCH 2, 1855. The Missouri swamp land act of 1868, Sess. Acts 1868, p. 72 §§ 24 and 25) does not constitute a relinquishment by the State of its title to such swamp lands as may have been sold by the general government since the passage of the said act of Congress; but only an authority to the Governor to relinquish at the request of the county court of any county in which such lands may be; nor does it amount to an unconditional acceptance of the indemnity offered to the State, for such relinquishment by the act of Congress of March 2d, 1855, but merely authorizes the Register of Lands to collect such indemnity from the United States in cases where relinquishment has been duly made by the Governor, or swamp lands belonging to the state have been sold by the general government. *Id.*

3. EVIDENCE. To show title to a tract of land in one claiming under the swamp land grant of Congress and the State Legislature

(U. S. R. S., p. 456, §§2479, 2481; Sess. Acts 1851, p. 238) it is not sufficient to prove that the tract was on the 28th day of September 1850, swamp or overflowed land. There should be evidence that it has been selected or designated as such by State or Federal authority. *Lockwood v. Hann. & St. Jo. R. R. Co.*, 233, *Cooper v. same*, 238.

4. EJECTMENT: RAILROAD GRANT: SWAMP LAND GRANT: EVIDENCE OF TITLE. As against a plaintiff claiming title to land under the railroad grant of Congress to the State of Missouri (10 U. S. Stats. 8) it is a sufficient defense in ejectment, if it is shown that the land was swamp and overflowed land within the meaning of the act of Congress granting such lands to the several States (U. S. R. S. p. 456, §§ 2479, 2481), whether the proper steps have been taken to perfect the defendant's title or not. Swamp lands are excepted from the operation of the railroad grant. *Hann. & St. Jo. R. R. Co. v. Snead*, 239.

TAXES.

1. POWER OF LEGISLATURE TO GRANT EXEMPTION. In the absence of constitutional restriction the legislature has power to grant exemption from taxation; but such exemption must be clear and unambiguous, or it will not be allowed. *Scotland County v. Missouri, Iowa & Nebraska R'y Co.*, 123.

2. CORPORATION: TAXATION EXEMPTION OF STOCK EXEMPTS CORPORATE PROPERTY FROM. A railroad company whose stock is by law exempt from taxation, can not be taxed on property owned and used by it in the operation of its railway and necessary for that purpose. The stock is but the representative of the property. *Id.*

3. LEGISLATIVE EXEMPTION: EFFECT OF SUBSEQUENT CONSTITUTIONAL PROHIBITION AGAINST EXEMPTIONS. The charter of a railroad company exempting the stock of the company from taxation, is not repealed by a constitutional provision adopted after acceptance of the charter, declaring that "no property shall be exempt from taxation, except," &c. *Id.*

4. SEC. 16, ART. 11, CONSTITUTION OF 1865 CONSTRUED. Sec. 16 Art. 11 of the constitution of 1865 was not designed to withdraw existing exemptions from taxation. It was intended to operate prospectively only. *Id.*

5. EXEMPTION: POWER OF LEGISLATURE TO WITHDRAW: CONSTRUCTION OF STATUTE. Sec. 7 of the corporation law (R. S. 1855 p. 371) declares that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature." Sec. 56 of the railroad law (R. S. 1855 p. 438) declares that "the legislature may at any time alter or amend this act; but such alteration or amendment shall not impair the rights of companies previously organized." Sec. 57 (Ib) declares that in future "all railroad companies shall have all the privileges contained in this act." In 1857 the legislature chartered the Alexandria & Bloomfield railroad company by a special act, which exempted the stock of the company from taxation for a term of years; *Held*, that the right of amendment reserved to the legislature was that contained in section 56 only, and that the exemption could not be withdrawn after the company had organized. *Id.*

6. ROAD OVERSEER: TAXATION: TOWNSHIP ORGANIZATION. Under the Township Organization law (Acts 1873, p. 105, a. 9; p. 107, art. 11), a road overseer has no authority to incur a debt in keeping the highways in repair, beyond the amount of the fund derived from the taxes levied by the township board; and if his expenditures exceed that amount, he cannot recover the excess from the township. *Ewell v. Virgil Township*, 657.

SEE CO-TENANT.

SCHOOLS, 3.

U. S. SUCCESSION TAX, 1, 2, 3.

TENANT-IN-COMMON.

SEE CO-TENANT.

THREATS.

SEE MURDER, 7.

TITLE BOND.

1 ASSIGNMENT. The obligee in a bond for title to land has such an interest as may be assigned, and this both by virtue of the statute (2 Wag. Stat. 999, § 2,) and independent of that statute. *Melton. v. Smith*, 315.

TORTS.

1. LIABILITY OF MUNICIPAL CORPORATION FOR TORTS: TREBLE DAMAGES: STATUTE OF TRESPASSES. A municipal corporation is liable for an act done by its agents, which is in its nature lawful and authorized, but is done at an unauthorized place or in an unlawful manner, but not for an act which is in its nature unlawful or prohibited. For an act of the former class it is liable only in single damages; the treble damages allowed by the statute concerning trespasses (Wag. Stat. p. 1345) cannot be recovered. *Hunt v. The City of Boonville*, 620.

SEE COAL OIL INSPECTOR.

TOWN.

SEE SCHOOLS, 1, 2, 3.

TOWNSHIP ORGANIZATION.

SEE ROAD, 4.

TREBLE DAMAGES.

SEE TORTS.

TRESPASS.

SEE INJUNCTION, 2.

TORTS.

TRIAL.

See Amendment, 1.

TRUSTS.

See Circuit Clerk.

Dower, 1, 2.

UNDUE INFLUENCE.

See Equity, 1, 2.

UNITED STATES SUCCESSION TAX.

1. Lien of: personal liability for. A purchaser of land, upon the descent of which a succession tax is due under the act of Congress (2 Bright. Dig. 370 § 327) incurs no personal liability to pay it; but takes the title subject to a lien for it. *Wilhelmi v. Wade*, 39.

2. ———. No one can be made liable for payment of a share of the succession tax due on the descent of a tract of land greater than his share in the land. *Id.*

3. ———; payment by sheriff. The act of Congress does not authorize a sheriff, who has sold land and collected the proceeds under an order of court in a partition suit to pay the succession tax due upon the descent of the land. *Id.*

VARIANCE.

See Evidence, 5.

Forgery, 3.

VENDITIONI EXPONAS.

1. Nature of the writ. The writ of *venditioni exponas* is a writ of execution; under it the lien and levy of the original writ, which it is issued to enforce, will continue. *Hicks v. Ellis et al.*, 176.

2. Effect of act of March 23, 1863, concerning executions on levy of original writ. Before the passage of the act of March 23, 1863, (Sess. Acts 1863, p. 20,) a writ of *venditioni exponas* had issued from the circuit court of one county to the sheriff of another county to enforce a levy on real estate previously made under an execution, which had expired without a sale being made, because there had been no term of the circuit court of the latter county at which it could be made. The *venditioni exponas* was returnable to the December term, 1863, but for the same reason no sale was made till March, 1865; *Held*, that under the 3d section of that act the original levy remained in force, and the sale then made was valid. That section applies to any execution issued from a court of record in one county to the sheriff of another, under which real property might be sold, whether the levy was made under such execution or under some other writ, which is supplemented or succeeded. *Id.*

See Evidence, 8.

VENDOR'S LIEN.

1. EXCHANGE OF REALTY: AGREEMENT TO REMOVE INCUMBRANCE. Where a married woman owned a lot as her own separate estate, and agreed to exchange the same for mill property, making an agreement that she would, at the time of exchanging deeds as part of the consideration for the mill tract, remove an incumbrance of $1000 on the town property; but on exchanging deeds she failed to remove the incumbrance; it was held that equity would charge the mill tract with the incumbrance, and compel a sale of such tract for the payment of such incumbrance, regarding it as a vendor's lien. *Pratt v. Eaton*, 157.

2. WAIVER. This result would not be affected by reason of the fact that, subsequent to the exchange of deeds, the owner of the mill tract accepted a bond, signed by one of the grantees in the deed for the mill tract and by the husband of the owner of the town lot, and this for two reasons: *First*—Because the evidence showed that the bond was not accepted, nor intended as a waiver of the vendor's lien; *Second*—Because the bond could not be regarded as an independent security of a third person, since the husband was already bound by his statutory covenants contained in the words "grant, bargain and sell," and the bond given could do no more. *Id.*

3. HUSBAND: WIFE'S PROPERTY: STATUTORY COVENANTS. It was held that notwithstanding the fact that the husband was not the owner of the town lot when he joined with his wife in conveying, still in the contemplation of the statute he was a "grantor," and as much bound, therefore by his statutory covenants as if owner of the land. *Id.*

4. VENDOR'S LIEN, WAIVER OF. That were this not so, the result arrived at in the opinion would still be the same; for, granting that the acceptance of the bond of the husband was *prima facie* evidence of a waiver of the lien, such acceptance was not conclusive, and the evidence was clear that no such intention was entertained. *Id.*

VENUE.

1. CHANGE OF VENUE: DELAY IN TRANSMISSION OF PAPERS: PRACTICE, CRIMINAL. Failure of the clerk of the circuit court to transmit without delay to the proper court a copy of the record and proceedings in a criminal case removed by change of venue on the application of the defendant, does not constitute negligence on the part of the prosecution. *The State v. Cox*, 29.

2. CHANGE OF VENUE. An application for a change of venue, on the ground that the judge and the people of a county were prejudiced against defendant; *Held*, defective, because it failed to state that on this account, defendant could not have a fair trial; because not accompanied by the affidavit of two credible witnesses of the county, sustaining the allegations in the petition, as to the prejudice of the people of the county as required by Sec. 41, Vol. 2, Wag. Stat., 1100; and also, because it did not state that the judge of the court was prejudiced. *State v. Lawther*, 454.

SEE PRACTICE, CRIMINAL, 1.

VERDICT

1. MISCONDUCT OF JURY. It is such misconduct as will invalidate a verdict in a criminal case, if the jury arrive at it through an agreement that each juror shall designate the term for which he thinks the defendant should be imprisoned, that the aggregate of these figures shall be divided by twelve and this quotient shall be the verdict. *State v, Branstetter*, 149.

SEE PLEADING, 2.

PRACTICE IN SUPREME COURT, 1, 2, 10, 13.

ROBBERY.

VESTED RIGHT.

SEE ATTACHMENT, 6.

WAIVER.

SEE CONTRACT, 4.

PRACTICE, CIVIL, 3.

VENDOR'S LIEN, 2, 4.

WITNESS, 7.

WANT OF PROSECUTION.

SEE PRACTICE, CRIMINAL, 1.

WARRANT.

SEE COUNTY WARRANT.

POLICE POWER.

STATE BOARD OF EQUALIZATION.

WARRANTY.

1. WARRANTY OF QUALITY: PAYMENT OF PURCHASE MONEY AFTER DISCOVERY OF DEFECTS, EFFECT OF, AS BAR TO ACTION ON WARRANTY. Payment of part of the purchase money after discovery of defects in a machine sold with warranty, is no bar to an action on the warranty, where, before the payment, the purchaser offered to return the machine, but was induced to retain it for further trial by the promise of the seller either to remedy the defect or, failing in that, to rebate a part of the price, and the payment was made while the seller was endeavoring to provide the remedy. *Courtney et al. v. Boswell et al.*, 196.

2. MEASURE OF DAMAGES. In an action for breach of warranty that a machine is fit for use, the measure of damages is the difference between the price paid and its real worth, with interest at six per cent. *Id.*

3. PARTITION SALE: PURCHASE BY PART OWNER: NO WARRANTY OF TITLE. The rule that a sale in partition under a decree of court carries no warranty of title, applies as well when one of the part owners is the purchaser as when a stranger is the purchaser. The maxim, *caveat emptor*, applies in either case; and the purchaser takes the land subject to all existing incumbrances. *Stephens v. Ells*, 456.

SEE DAMAGES, 2.

WILL.

1. REVOCATION. A testator, intending to revoke a will, caused it to be burned. He had already prepared and signed a second will making materially different dispositions of the property. At the time of burning the second will was not attested, and the testator understood that until attested, it would not be complete. It was subsequently attested, and after the death of the testator was offered for probate, but was rejected by the probate court. In an action to establish the first will: *Held* that the burning operated a complete revocation, and this result was not changed by the fact that the second will never took effect. *Bankz et al. v. Banks et al.*, 432.

2. POWER GIVEN BY WILL: EXECUTION OF. A conveyance in fee with covenants of seizin and warranty will be held, at least in favor of a purchaser for value, to be a good execution of a power to convey in fee given by a will to a tenant for life, though the conveyance contains no reference either direct or indirect to the will or the power. *Campbell et al. v. Johnson*, 439.

3. DEVISE: FAMILY. A devise to "H. S. and family" is a devise to H. S. and his wife and children. *Hall v. Stephens*, 670.

4. DEVISE: FAMILY: EVIDENCE. When a devise is to "H. S. and family," evidence will be received to ascertain who constitute the family. *Id.*

5. HUSBAND AND WIFE: ESTATE IN LAND. Both at common law and under the statute (Gen. Stat. 1865, p. 443 § 12) husband and wife, to whom a devise is made, take as joint tenants and not as tenants in common; and when a devise is made to husband and wife and other persons, the husband and wife together represent a single unit or integer of legal identity, and together take a share equal to the share of each of the others. *Id.*

SEE DEEDS, 6.

PROBATE COURT, 1.

WITNESS.

1. JUROR. A member of the jury is not a competent witness to prove misconduct on the part of the jury in arriving at their verdict. *The State v. Branstetter*, 149.

2. HUSBAND AND WIFE. A husband is not a competent witness in a suit to which his wife is a party, unless he has a substantial interest in the controversy, or acted as her agent in the transaction which is the foundation of the suit. *Haerle v. Kreihn*, 202.

3. CASE ADJUDGED. In a suit by a married woman and her husband to redeem land from a mortgage, it appeared that, the husband having bought the land and being unable to finish paying for it, defendant had completed the payments for him, and had received a conveyance from him and his vendor, to be held as security for the money advanced, and had gone into possession of the premises; that subsequently the husband's interest in the land, having been sold under execution, had been acquired by his wife, and that the land was worth much more than the amount remaining due to defendant on account of his advances; *Held*, that the husband, though joined with his wife as a party plaintiff, in obedience to the statute, had no substantial interest in the controversy, and is not a competent witness. *Id.*

4. WITNESS. When one of the parties to a contract is dead, the other is no more competent as a witness to prove acts of part performance under the contract than to prove the contract itself. *Sitton v. Shipp et al.*, 297.

5. TESTIMONY OF DECEASED WITNESS: CRIMINAL PRACTICE. When it is shown that a person who testified on a former trial of a criminal case, has since died, his testimony then given may be proved and received in evidence. A witness called to prove what the testimony was, need not give the exact words of the deceased witness, but may give the substance of what he said. *The State v. Able*, 357.

6. ———: CASE ADJUDGUD. It appearing on a second trial of a capital case that a witness who testified at the first trial, had since died, a bill of exceptions agreed to at that time both by the State's attorney and the counsel for the defendant, and signed by the judge who tried the case, was allowed to be read in evidence as the testimony of the deceased witness, proof having been made that it embodied the substance of his testimony, though it was not shown to be all he said, or in the very language that he used; and for the purpose of identifying the testimony a witness was allowed to look at the bill of exceptions, in order to refresh his memory as to the name of the deceased witness. *Id.*

7. CRIMINAL PRACTICE: ABSENT WITNESS. The defendant in a criminal case, by reading to the jury an agreed statment of what would be the testimony of an absent witness, who has been duly subpœned on his behalf, waives his right to have the witness personally present. *The State v. O'Connor*, 374.

SEE EVIDENCE, 15.

WRIT OF ERROR.

1. A WRIT OF ERROR does not lie on behalf of the State in any criminal case (construing Wag. Stat. 1114 §§ 13, 14, 1, 2; and ovorruling *State v. Newkirk*, 49 Mo. 472 and *State v. Peck*, 51 Mo. 111.) *The State v. Copeland*, 497; *The State v. Cutter*, 503; *The State v. Hamilton*, 667.

SEE PRACTICE IN SUPREME COURT, 12.